(18,426.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 257.

THE DEFIANCE WATER COMPANY, APPELLANT,

vs.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Exhibit A—Ordinance to authorize and provide for the construction and maintenance of a system of water works in the city of Defiance	19	11
B—Resolution accepting water works	31	18
Notice of application for injunction	32	18
Certified copy of application and marshal's return	33	20
Appearance of City of Defiance	35	21
Appearance of City Council	35	21
Demurrer of City Council	36	21
Demurrer of City of Defiance	39	23
Order granting leave to file amended bill	42	25
Amended bill	42	25
Demurrer of City of Defiance to bill and amendment	46	27
Demurrer of City Council to bill and amendment	49	29
Continuance	52	31

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1902.

	Original.	Print
Opinion of the court—demurrers overruled	53	31
Order overruling demurrers	55	32
Application to file supplemental bill	56	33
Supplemental bill	56	33
Exhibit A—Judgment of dismissal in State court	58	35
Order granting leave to file supplemental bill and requiring defendants to answer	60	36
Joint and several plea	61	36
Exhibit A—Resolution to draw warrant in favor of water company, January 7, 1896	78	48
B—Resolution declaring it necessary to issue bonds, December 6, 1895	79	49
C—Resolution instructing water committee, March 12, 1897	80	50
D—Proceedings, April 20, 1897	80	50
E—Proceedings, June 1, 1897	81	50
F—Claim ordinance, July 7, 1896	81	50
G—Claim ordinance, January 5, 1897	81	51
H—Claim ordinance, July 20, 1897	82	51
I—Claim ordinance, August 3, 1897	82	51
Joint and several answer in support of plea	84	52
Præcipe to set plea for argument	89	55
Order overruling plea	89	55
Answer	90	56
Exhibit A—Report of finance committee in matter of water service	119	72
B—Resolution directing clerk to deliver warrant, December 9, 1895	120	73
C—Resolution declaring it necessary to issue bonds, December 6, 1895	121	73
D—Resolution to draw warrant in favor of water company, January 7, 1896	122	74
E—Claim ordinance, July 7, 1896	123	74
F—Resolution instructing water committee, March 12, 1897	123	75
G—Proceedings, April 20, 1897	124	75
H—Proceedings, July 1, 1897	124	75
I—Claim ordinance, January 5, 1897	124	76
J—Claim ordinance, July 20, 1897	125	76
K—Claim ordinance, August 3, 1897	125	76
L—Notice to water company, February 28, 1899	126	77
Motion to strike answer from files	128	78
Continuance	129	78
Motion to strike answer from files	130	78
Continuance	131	79
Order granting leave to set case for hearing on bill and answer	132	79
Replication	133	80
Motion to stay proceedings	135	80
Opinion of the court—motion overruled	141	84
Order overruling motion to stay proceedings	143	85
Order as to taking testimony	143	85
Order allowing amendment to prayer of bill	144	86
Amendment to prayer of bill	145	86

	Original.	Print
Continuance	145	87
Motion to file supplemental answer	146	87
Opinion of the court—leave to file plea	147	88
Plea	150	89
Order granting leave to file plea	161	96
Plea refiled	161	96
Order that plea is sufficient in law	162	96
Replication to plea	163	97
Order fixing time for taking testimony on plea	164	97
Continuance	164	98
Decree dismissing bill	165	98
Assignment of errors	169	100
Bond on appeal	174	103
Order approving bond	176	104
Evidence	177	104
Resolution of January 7, 1896	177	104
Deposition of C. W. McLellan	180	105
George J. Long	191	113
G. M. Eldridge	202	120
E. A. Latty (taken by defendants, cross-examination)	215	128
J. J. Malley (taken by defendants, part only)	218	130
E. A. Latty (taken by plaintiff)	223	133
Proceedings of the city council	227	136
Deposition of Henry Newbegin	241	144
Proceedings of the city council	243	145
Transcript from Defiance county circuit court, filed by defendants	247	148
Petition	248	148
Præcipe for summons	251	150
Order allowing injunction	252	151
Summons	253	151
Sheriff's return	254	152
Petition for removal	255	153
Bond for removal	257	154
Order for removal	259	155
Order of United States court remanding cause	260	156
Order granting leave to plead	261	157
Demurrer to petition	262	157
Judgment	263	157
Notice of intention to appeal	264	158
Appeal bond	265	158
Motion to dismiss appeal	266	159
Motion for leave to file complete transcript	267	160
Order granting motion to file complete transcript	268	161
Order denying motion to dismiss	269	161
Suggestion of diminution of record, &c.	270	161
Motion to dismiss appeal	271	162
Order on motion to dismiss	272	163
Appeal bond	273	163
Order taking demurrer under advisement	274	164
Order on demurrer, &c.	275	164
Order extending time to file amended petition	276	165

	Original.	Print
Answer	276	166
Reply	293	175
Exhibit A—Resolution to draw warrant in favor of water company, January 7, 1896	310	185
Motion to make reply definite, &c.	312	186
Order taking motion under advisement	313	187
Demurrer to reply	313	187
Order on motion as to reply	314	187
Order allowing bill of exceptions	315	188
Order of continuance	316	188
Bill of exceptions	317	189
Amendment to answer	317	189
Judges' certificate	319	190
Leave granted to supply missing petition	320	190
Order overruling demurrer	320	191
Order taking cause under advisement	321	191
Motion for new trial	321	191
Judgment	322	192
Order allowing bill of exceptions	325	194
Clerk's certificate	326	194
Judge's certificate	326	194
Clerk's certificate	327	195
Certificate as to adjournment of Defiance circuit court *sine die*	328	195
Transcript from Defiance circuit court, filed by complainant	329	196
Clerk's certificate	330	196
Exhibit "A" to petition in error—Journal entries of orders and judgment of circuit court	331	196
Exhibit A—Entries on appearance docket of circuit court	337	202
Original petition in court of common pleas (omitted in printing)	339	—
Petition and bond of the Defiance Water Company for removal of case to United States circuit court (omitted in printing)	341	—
Transcript of journal entries of court of common pleas (omitted in printing)	344	—
Entries on appearance docket of court of common pleas (omitted in printing)	348	—
Papers filed in circuit court (omitted in printing)	350	—
Motion of Defiance Water Company to dismiss appeal (omitted in printing)	350	—
Motion of plaintiff for leave to file transcript of docket entries (omitted in printing)	351	—
Motion of water company to dismiss appeal (omitted in printing)	352	—
Answer of the Defiance Water Company (omitted in printing)	352	—
Reply of plaintiff to said answer (omitted in printing)	364	—
Motion of water company to separate denials from affirmative matter of reply and to separately state and number causes of reply (omitted in printing)	378	—
Demurrer of water company to reply (omitted in printing)	378	—

	Original.	Print
Motion of Defiance Water Company for leave to amend its answer, and bill of exceptions No. 1, taken on refusal of motion (omitted in printing)	379	—
Bill of exceptions of Defiance Water Company No. 2 (omitted in printing)	381	—
Testimony of John P. Eiser...(omitted in printing)	382	—
E. P. Hooker... (" ")	385	—
John W. Winn. (" ")	387	—
John A. Deindorfer (omitted in printing)	388	—
Henry Schmick (omitted in printing)	390	—
J. J. Malley.....(" ")	392	—
M. B. Gorman..(" ")	394	—
James H. Kitche (" ")	396	—
Geo. T. Farrell (" ")	399	—
Concession by plaintiff that ordinance, Exhibit "A," was duly published (omitted in printing)	400	—
Concession that the journals of the city were correctly kept and what they purport to be (omitted in printing)	400	—
Exhibit A—except section 13—given in evidence by defendant (omitted in printing)	400	—
Parts of city records given in evidence (omitted in printing)	400	—
Deposition of G. M. Eldridge..(omitted in printing)	406	—
C. C. Kuhn.....(" ")	410	—
J. J. Malley ....(" ")	413	—
Motion by plaintiff for judgment in its favor	417	203
Signature of judges to bill of exceptions	418	204
Exhibit A—Ordinance .. .... (omitted in printing)	418	—
Motion of the Defiance Water Company for new trial (omitted in printing)	429	—
Deposition of W. A. Schmaltz	433	205
Exhibit A—Judgment, Defiance circuit court	438	208
Certified copy of Defiance circuit court trial docket entries	443	211
Clerk's certificate to transcript	446	212
Statement by appellant of errors relied upon and designation of parts of record to be printed and proof of service of same	447	213

1 UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division.

Record of the proceedings of the circuit court of the United States within and for the western division of the northern district of Ohio in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Toledo, in said district, on the first Tuesday in December, being the third day of said month, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the 126th, to wit, on the 21st day of December, A. D. 1901.

Present: The Honorable Francis J. Wing, United States district judge.

THE DEFIANCE WATER COMPANY
v.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Said action was commenced on the 24th day of June, A. D. 1898, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order, and on the dates hereinafter stated, to wit:

2 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL OF the City of Defiance. } 1473. In Equity.

To the honorable the judges of the said court in chancery sitting:

The Defiance Water Company a corporation organized under the laws of the State of Ohio by that name and having its principal place of business in the city of Defiance in said State of Ohio files this its bill therein and against the said The City of Defiance and the Council of the City of Defiance, the said city being a municipal corporation duly organized under the laws of the State of Ohio, and being a city of the fourth grade of the second class.

And thereupon your orator complains and says:—

That it was so organized for the purpose of operating water works in said city of Defiance, and by that means furnishing and supplying water to the citizens of said city and especially to the said city for use in the extinguishing of fires and other public uses. That the said council of said city now consists of eight (8) members, to wit, Charles D. Harris, Chauncey I. Morse, Daniel F. Krotz, Daniel

W. Coy, John Schneider, Frank X. Groselle, James H. Shulters, and Jacob A. Abele, all citizens of the said city of Defiance in said State. Further complaining your orator says that on the 4th day of January 1898 the said The City of Defiance by its city solicitor, as plaintiff brought suit against the said Council of the City of Defiance and the said Defiance Water Co. your orator, defendants, in the
3 court of common pleas of Defiance county, Ohio.

That the object of said suit and the prayer of the petition were, to restrain and perpetually enjoin the said council of said city from paying your orator any and all claims for water rents that had accrued to it against said city, especially the claim for $3142.50, due it from said city on the first day of January A. D. 1898, for the last half of the year 1897.

That the allegations in the petition in said suit in substance are:—That the said city solicitor brings said suit in the name of the city under the provisions of section 1777 and other sections of the law of Ohio, and that the Defiance Water Co. is a corporation organized under the laws of Ohio.

That the said city of Defiance by its council on the 17th day of August, 1887, attempted to enter into a so-called contract with one Samuel R. Bullock & Co. for supplying said city and its residents water, for fire and other purposes for the term of thirty (30) years thereafter at a fixed yearly rental of not less than $5200, to be paid annually by said city to said company.

That the said defendant The Defiance Water Co. claims to be the sole and absolute owner by assignment to it of said so-called contract, and of all the right, title and interest of said Bullock & Co. therein.

That said Defiance Water Co. has presented to said council its bill for water rentals amounting to $3142.50, claimed by said water Co. to be due it for water furnished said city during the last half of the year 1897, under and in accordance with the terms of said so-called contract.

That no other agreement for furnishing water to said city except so-called contract was ever entered into between the said city and water company, or other persons under which it (said company) might claim.

4 That unless restrained by the court from so doing, said city council will cause said claim to be paid said water Co. out of the public funds of said city and will also from time to time during the remainder of the term (30 years) of said so-called contract cause to be also paid to said water Co. from said public funds large sums of money for water rents to accrue in the future to said company for water to be furnished said city under said so-called contract.

That the payment of any sum of money whatever to said water Co. for any water furnished to said city under said so-called contract is a misapplication of the funds of said city and an abuse of its corporate powers, and would be the performance of a contract made in contravention of the laws of the State in this, to wit:—

That the ordinance of said city purports to be an agreement be

tween said city and said Bullock & Co. for supplying water for fire and other purposes to the said city and by the express terms thereof, it was for a full term of thirty (30) years thereafter, and that such so-called contract has not at any time been ratified by the vote of the electors of said city at any election therein held, nor ever submitted to such electors for their ratification or rejection, and said so-called contract is therefor- void.

That said so-called contract is illegal and void for want of the certificate of the city clerk of said city (there being no city auditor).

That the money required for the payment of the debts, obligations and liabilities thereunder was in the city treasury to the credit of the funds from which it was to be paid.

That by reason of the premises the said water Co. is not entitled to demand or receive any sum of money whatever from said
5 city for any water either already furnished by it to said city, or which it may hereafter furnish to said city, under the terms of said so-called contract.

That on the said 4th day of January, 1898, a temporary injunction was allowed by the probate judge of said Defiance county, acting *pro hac vice*, as the judge of said court of common pleas as prayed for in the plaintiff's said petition which said order of injunction is as follows, to wit:—

"It appearing to me, J. H. Hockman, probate judge within and for the county of Defiance, in the State of Ohio, that there is no judge of the supreme court or circuit court or of the common pleas court of said State now within said county, this matter came on for hearing upon the motion of the said plaintiff for a temporary restraining order herein as prayed for in plaintiff's petition and the evidence, and it appearing that the interest of the plaintiff would be prejudiced herein were notice of this application to be given to the said defendants, it is therefor- ordered that notice herein be dispensed with. It is further ordered that a temporary restraining order be allowed as prayed for in said petition, restraining the said defendant- until such further order be made herein, and until such order shall be modified, set aside, or made perpetual."

That the said order of injunction was duly served on your orator on the same day it was allowed.

That the said council was made a party defendant to said suit as a body and not as individuals, and your orator is informed that service of said order of injunction was made only on the then president of said council, one, W. Kniss, who has now ceased to be a member thereof, and as your orator is advised by its counsel, and hence so charges, no legal service of said order was or ever has been made on the other members of the said city council.

6 Further complaining, your orator says:—That on the 17th day of August, A. D. 1887, the defendant corporation, the said City of Defiance, duly passed an ordinance entitled "An ordinance to authorize and provide for the construction and maintainance of a system of water works in the city of Defiance, Defiance county, Ohio." A copy of which said ordinance is hereunto annexed as Exhibit "A" and hereby made a part of this cross-bill.

That by the terms of said ordinance in section first, the right and privilege for the period of thirty years thereafter was granted unto the said Samuel R. Bullock & Company, their associates, successors and assigns "of locating and operating a system of water works in said city in accordance with the provisions of the ordinance," and of using the streets of said city for the purpose thereof, and for laying their pipes, conduits and hydrants therein, the same being in consideration of the public benefit to be dereved therefrom.

That by the terms of section three of said ordinance it was contracted by and between the said city of Defiance through the said city council that the said city should and did thereby rent of the said Samuel R. Bullock & Company, their associates, successors and assigns "one hundred and thirty double-nozzled frost-proof water hydrants for the aforesaid period of thirty years at the annual rental of forty dollars a year for each hydrant, payable semi-annually on the first day of January and July in each and every year" and that the city should have the privilege and right of the rental of any other hydrants it might wish, to be constructed by the said Samuel R. Bullock and Company and its assigns upon demand of said city at the rate of thirty-five dollars per year for each and every hydrant,
7 payable as aforesaid and during the unexpired period of said terms of thirty years. The water through said hydrants, under the terms of said contract, was to be used by the said city for the extinguishing fires, necessary fire practice, for flushing the sewers thereof, "and also for all sanitary purposes and the washing out of the gutters and ditches of the streets of said city under the control of the said council and the superintendent of the water works."

It is further provided in section four of said ordinances that in consideration of the rentals to be paid as aforesaid for such hydrants, and for the right and privilege as aforesaid for the use of the streets for the said terms in the construction of said water works, that the said Bullock & Company, its successors and assigns, should furnish water "free of charge to the public and parochial schools, Defiance college, Defiance Riverside cemetary, all public buildings used for city purposes now erected or which may be hereafter erected during the life of this franchise; also for public drinking fountains with openings for man and beasts and for ornamental fountains to be erected at the expense of said city, in such places or line of mains as said council may direct." Also additional drinking hydrants and all waters for the Defiance Agriculture Society during the meeting of their annual fair, were to be supplied free of charge to the city by the said water company.

In section five of said ordinance it was provided that the said Samuel R. Bullock & Company, their associates, successors and assigns would procure and organize a water-works corporation under the laws of the State of Ohio and were authorized thereby to assign to said corporation all the rights and privileges acquired under and by virtue of said ordinance.

It was further provided in said ordinance and contract that
8 the said Samuel R. Bullock & Company, their associates, successors and assigns should submit the water works to a

certain test named therein, on performance of which test the said city of Defiance, through its said city council agreed formally to accept said system and the said Samuel R. Bullock & Company, their associates, successors and assigns, were required further by said ordinance to file a written acceptance thereof in the office of the city clerk of the said city of Defiance with their bond in the penal sum of five thousand dollars executed to the said city of Defiance, and conditioned for the faithful compliance with the terms of said ordinance and contract.

Further provisions of said ordinance required the said Samuel R. Bullock & Company, their associates, successors and assigns to make, extension of their water mains whenever required to do so by the said city council, provided that no extension should be less than five hundred feet in length and that one public hydrant should be located on each five hundred feet thereof.

There was a further provision in said ordinance by which it was agreed between the parties thereto, the said Samuel R. Bullock & Company, their associates and the said city of Defiance, that the said city at the expiration of ten years after said ordinance took effect, should have the right to purchase the said system of water works upon giving six months' previous notice thereof, upon certain terms named in said ordinance, and upon failure to give due notice of purchase at the expiration of said ten years, the said city had the right to make such purchase by giving notice six months prior to the expiration of five years thereafter.

Your orator further complains and says that the said Samuel R. Bullock & Company, on behalf of themselves, associates, successors and assigns filed their written acceptance of said ordinance and contract in the office of the city clerk of the said city of Defiance, with
9 their bond in the penal sum of five thousand dollars, executed to the said city and conditioned for the faithful performance of the terms of said ordinance and contract; and thereupon they, the said Samuel R. Bullock & Company, entered upon the construction of the said water works in accordance with the terms of said ordinance and during their construction the said company became largely involved in indebtedness, contracted to different persons and companies in furnishing material and loans of money to pay for the work of construction etc., especially had said company become indebted to Dennis Long & Company a corporation of the city of Louisville, State of Kentucky, for water pipes furnished them to go into the construction of their water works, in the sum of $49,175.00, and the firm of Boody, McLellan & Company, bankers of the city of New York and to one N. T. Sprague, of the city of New York in the total sum of about $100,000.00 more; that failing to pay the same during the fall or winter of 1887, the said Dennis Long & Company placed their claim against said S. R. Bullock & Company in the hands of an attorney for collection, and through their said attorney said company brought suit and attached, or was about to bring suit and attach and levy on said water works and material therefor, in satisfaction of their said claim, when by agreement of all the parties in interest and with the consent and

knowledge of the defendant, The City of Defiance, said Bullock & Company assigned and transferred to The Defiance Water Company, your orator, a corporation which was then organized for the purpose with a capital of $200,000.00, all of their right and interest in the said property and waters works & in the said contract with the said city for furnishing it with water under its ordinance as aforesaid. And said creditors of said S. R. Bullock & Company took an amount of stock in said corporation so organized in proportion to the several amounts of the indebtedness of the said S. R. Bullock & Company to each of them.

10 Thereupon the said Defiance Water Company went on and completed the construction of the said water works in accordance with the terms of said ordinance and said contract with the said city of Defiance, to the entire satisfaction of said city and its council, so that the said water works stood and performed the test as above set forth and required by the said city council; and the same were by resolution of the said city council, passed on the 5th day of March, A. D. 1889, accepted as will appear from a copy of said resolution hereto annexed as Exhibit "B."

Further, your orator says that the actual cost of the construction of said water works and of the extension of the mains and the placing of hydrants therein as they now exist, amounted to the sum of $196,000.00 for which amount the bonds of said company have been issued, secured by a mortgage of all the company's plant and property constituting the water works. That of said bonds there have been issued to the said Dennis Long & Company of the city of Louisville, Kentucky an amount of $85,000.00 and to the said Boody McLellan & Company and N. T. Sprague, both of the city of New York and the State of New York an amount of $111,000.00. That said Dennis Long & Company now hold of said bonds $74,000.00 in amount and that the said Boody McLellan & Company and N. T. Sprague now hold a very large proportion of the said bonds originally issued to them the exact amount of which your orator is ignorant, as it is also ignorant as to the persons who hold the remainder of such bonds so issued.

That the said Dennis Long & Company, Boody McLellan & Company and N. T. Sprague, took an assignment of the said interest of the said Samuel R. Bullock and Company in said contract and ordinance and completed the construction of said water works and took and received the said bonds in satisfaction of their said

11 claim, in full faith that the said city of Defiance would comply with its contract for the use of said water as aforesaid, and from the revenue derived from the rentals of the said hydrants to the said city they relied for repayment and for all and any remuneration whatever on their money so invested. And your orator, the said Defiance Water Company, has no other resources or means of paying the interest upon said bonds or any part thereof except from the rentals derived from the use of said hydrants by the said city of Defiance.

That the total revenue from all other sources is wholly insufficient to meet the expenses of the operation of said water works, and that

the net annual revenue derived from the operation of said works, including all annual rentals for the use of said hydrants by the said city of Defiance, under said contract is not sufficient to pay at the most, more than 2½ % of interest on said bonds held by the parties aforesaid.

Your orator further complaining says that at the completion of said water works it had constructed the said 130 hydrants so rented by the said city at $40.00 per annum, and also at the same time at the request of said city additional hydrants, and that from time to time thereafter down to July 1895, on the demand of the city it extended its mains and constructed additional hydrants, so rented by the city at $35.00 each per year, and the total number amounted to 32 additional hydrants. That for one of said hydrants which has not been used by the said city since January 1st, 1897, no charge since then has been made to the city; and that the said city is now using, as hereinafter set forth, the 130 original hydrants at the rental of $40.00 each per annum and 31 additional hydrants at the rental of $35.00 each per annum, and that all the time from the completion of said water works and from the placing of said additional
12 hydrants to the present time, the said city has used the same under its contract for the purposes aforesaid, and your orator furnished and supplied water to said city continuously by means of said hydrants for the purposes aforesaid, and has also during all that time, at very large expense to itself furnished free to said city for the purposes named in section four of said ordinances and for other purposes, all the water required by the terms of said contract to be furnished by it, and it is still so furnishing all the water to said city and the public required by said ordinance and contract.

And the said city has paid therefor semi-annually all the rents that accrued under said contract to your orator down to January 1st, A. D. 1898, except the sum of $500.00 due July 1st, 1895 of the rents that had accrued for the first half of the year 1895, for which $500.00 and interest, your orator has brought suit in the court of common pleas of Defiance county against the said city of Defiance and it is now pending therein.

That from the time of the completion of said water works and the construction of said hydrants the city of Defiance has had entire control and possession of the said 161 hydrants so construction by your orator, and has made use of them as the sole means of extinguishing fires in said city and the said city is still using the same and has the entire possession and control thereof under their said contract.

Notwithstanding which, the said city council at its regular meeting, January 7th, A. D. 1896 passed an ordinance or resolution in substance rescinding and annulling said contract of the city with The Defiance Water Company, your orator so far as it had power so to do; and providing by the terms of said ordinance or resolution, by which it should allow the bill of said water company for
13 the rents that had accrued to them from the said city for the last half of the year 1895, that the payment of the said bill should not be "construed or taken to be any acknowledgement of

any contract between them and the said city for said water rentals or in any manner implying any actual performance of any alleged contract and that no further payment at the present rate be made to the said company."

Your orator further complaining says that on January 1st, A. D. 1898, there had accrued and there was due and payable for water rent for the hydrants so as aforesaid rented, from the said city of Defiance to the said Defiance Water Company for the last half of the year 1897 the sum of $3142.50.

Your orator further says that it is informed and believes and hence so charges that the said council and the several members of it, ever since the passage of said resolutions or ordinance of January 7th, A. D. 1896, have claimed and repeatedly stated and given out to the public generally, that the said city has no such contract as aforesaid for furnishing water to it by the said The Defiance Water Company, and that they have also passed resolutions and ordinances looking toward the construction of water works by the said city for furnishing it and supplying it and its citizens the public generally with water in the same manner, and for the same purpose your orator has now been supplying it under its said contract and the public, notwithstanding that the said city through its council or otherwise, did not give any notice of its intention to purchase the said water works of your orator in accordance with the terms of said ordinance and it never has offered to purchase them in accordance with the said terms, or otherwise.

That as aforesaid your orator, as the assignee of the said Samuel R. Bullock & Company has fully complied with all
14 the conditions of said ordinance and contract upon its part; that it has continually furnished all water for public purposes and fires, called for in said ordinance and contract, to the city, upon the terms therein required, and has furnished the citizens of said city water for all purposes, for which it never has exceeded or charges prices in excess of that prescribed by said ordinance; and it is still furnishing to the city and to the citizens water as aforesaid.

That, notwithstanding which as your orator is informed and believes and hence so charges, many if not all of the members of said city council, after the said $3142.50 water rents for the last half of the year 1897 had accrued and become due and payable from the city to your orator, combined colluded and confederated together between themselves with the said city solicitor, to procure him, said city solicitor, to institute said suit, and to procure an order of injunction against themselves the said city council prohibiting them from paying to your orator the said sum of money or any part thereof for water said city had already used and which sum as they well knew was justly due and owing by the said city to the said water company; and that said suit was brought by said city solicitor in the name of the city through and by the procurement of the members or a part thereof of the *of the* said city council, and they thereby procured to have themselves enjoined from allowing or paying your orator said amount due it. Your orator further says that it applied

to and requested said council by its attorney, at its regular meeting on the 18th day of January, 1898, to aid it in the defense of said suit of the city against said council and said Defiance Water Company and that they refused so to do.

That if said order of injunction shall stand and be made perpetual, the said City and Council of Defiance, said defendants,
15 will thereby deprive your orator of its property without due process of law, and by means of said order of injunction they will confiscate your orator's property and convert it to their own use without payment therefor and without trial by jury, contrary to the provisions of the Constitution of the United States.

Your orator further says that having had the use of your orator's property under the terms of said contract, and having stood by and seen it make large investments and spend large sums of money in the construction of the said water works and in supplying the said city and its citizens with water, that the said city and the said city council are now estopped from denying the existence of said contract and from abrogating it. That the said defendants having induced your orator to expend large sums of money for the purposes aforesaid relying on their said agreement and promise to your orator for the use of said water, and having received and still enjoying the benefits of what your orator has so done and furnished, equity and good conscience require said defendant to pay the agreed price therefor. That the passage of said ordinance or resolution and the attempt thereby to abrogate and annul said contract controvenes the provisions of section 10 of article 1 of the Constitution of the United States, in this, that they are laws impairing the obligation of their said contract with your orator.

Further your orator says that the said Dennis Long & Company, Boody McLellan & Company, and N. T. Sprague, learning of the passage of said resolution or ordinance of January 7th, 1896, by the said city council, have demanded of your orator, the said water company to institute proceedings in this court and to pray for an order of injunction therein restraining and enjoining the city council from repudiating their said contract, and commanding them
16 to allow and pay the water rents that have already accrued against said *said* city as aforesaid; stating and averring to your orator that they took and received its said bonds in payment of their claim against the said Samuel R. Bullock & Company and the said Defiance Water Company, relying upon the income to be derived from said contract for the payment of interest thereon. That said bonds bear interest at the rate of six per cent. per annum and which rate of interest your orator is obliged to pay to the holders thereof.

Your orator further complaining says that the said city of Defiance has a fund known — "the water fund" from which the said water rents, as they accrue from time to time were paid; and that taxes have already been collected, and are now in said fund for the payment of the balance hereinafter named of said $3142.50 but that on account of the folly extravagance and illegal expenditures of the moneys of the said city by the said city council there is a pressing

indebtedness against it, so that the council are likely to divert the said fund unless restrained by an order of this court, to the payment of said other indebtedness.

That notwithstanding said order of injunction restraining the council of said city from paying your orator said sum of money yet, said council after that they pretended to have been served therewith voluntarily paid $756.00 and there still remains due and unpaid from said city of Defiance to your orator of said sum a balance of $2386.50, which bears interest at the rate of six per cent. per annum from the 1st day of January A. D. 1898.

Wherefore your orator prays that the defendants may, if they can, show why your orator should not have the relief hereby prayed for; and that they may make full disclosure and discovery of all the matters aforesaid, and full true and direct answer make to all the matters hereinbefore stated and charged, but not under
17 oath; answer under oath being expressly waived. And that upon the final hearing hereof, an account may be taken of the amount due your orator from the said city of Defiance for water rents that have accrued to it under its said contract, including the said $500.00 balance for the first half of the year 1895 payable July 1st, 1895, as well as for the rents that may accrue & become payable to your orator from the city of Defiance, pending this suit, and for interest thereon; and that the said city and the city council may be decreed and ordered to allow and pay the same.

And your orator further prays that a provisional or preliminary injunction may be issued, restraining the said defendants from appropriating and diverting the moneys in said water fund to the payment of any other indebtedness than that due to your orator, pending this suit. That upon the final hearing thereof, the said city council and the said city may be perpetually enjoined from thereafter denying the existence of said contract, and abrogating or attempting to abrogate or annul the same; and that your orator may have such other and further relief herein against the said defendants, as the equity of this case may require and to your honors may seem meet.

And may it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna, of the United States of America, directed to the individual members of said council to wit:—Charles D. Harris, Chauncey I. Morse, Daniel F. Krotz, Daniel W. Coy, John Schneider, Frank X. Grosselle, James H. Shulters and Jacob D. Abele, and against the said City of Defiance commanding them on a day certain to appear and answer to this bill of complaint and to abide and perform such order and decree in the premises, as to the court shall seem proper, and required by the principles of equity and good conscience.

HENRY NEWBEGIN,
Solicitor for the Complainant, The Defiance Water Co.

18 UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Defiance County, }

On this 28th day of April, A. D. 1898, before me personally, came Peter Kettenring, vice-president of The Defiance Water Company, the complainant above named in the foregoing bill, and being by me duly sworn says: That he is the vice-president of the Defiance Water Company and familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true in substance and in fact, except as to matters therein stated of information and belief; as to these matters he believes them to be true.

PETER KETTENRING.

Sworn to before me and in my presence subscribed this 28th day of April, 1898.

[SEAL.] GEORGE W. DEATRICH,
Notary Public.

19 EXHIBIT "A"

Water Works.

An ordinance to authorize and provide for the construction and maintainance of a system of water works in the city of Defiance, Defiance county, Ohio.

Be it ordained by the council of the city of Defiance, Ohio.

SEC. 1. That in consideration of the public benefit to be derived therefrom, the right and privilege is hereby granted for the period of thirty years from the time that this ordinance takes effect unto Samuel R. Bullock and Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of water works in accordance with the terms and provisions of this ordinance, and such other ordinances as may hereafter be passed from time to time by the said council of said city of Defiance, Ohio, and of using the streets, alleys and public squares and all other public places within the corporate limits of the city of Defiance, Ohio, as they now exist or may be hereafter extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the city of Defiance and to its inhabitants, for public and private use, and for making repairs and extension to the said system from time to time during the period in which this ordinance shall be in force provided always that no extension to mains shall be made except as hereinafter provided.

The said Samuel R. Bullock and Company, their associates, successors and assigns shall exercise the greatest care and diligence in the use of the said streets, alleys public squares and other
20 public places, and shall cause no unnecessary obstruction of, or interruption to the public travel over or upon the same,

or any injury to, or interference with any pipes, mains or sewers, which may be now located beneath the surface thereof.

The said Samuel R. Bullock and Company, their associates, successors and assigns, shall take every precaution to provide against danger of life and limb, by reason of the exercise of the rights and privileges hereby granted and shall cause all excavations and obstructions to be properly lighted and guarded at night and after the completion of the purposes for which the said streets, and public squares, and other public places may be used, they shall be returned to their former condition without unnecessary delay, and to the satisfaction of the street committee.

The said Samuel R. Bullock and Company, their associates, successors and assigns hereby agree to hold the city of Defiance harmless from any liability which may result to it by reason of any violation of this section.

SEC. 2. The general plan of the said system of water works shall be as follows:

Mains.

Mains 16 inches in diameter, there shall be of not less than 2650 feet.

Mains 14 inches in diameter, there shall be of not less than 6300 feet.

Mains 12 inches in diameter, there shall be of not less than 1500 feet.

Mains 10 inches in diameter, there shall be of not less than 2800 feet.

Mains 8 inches in diameter, there shall be of not less than 12200 feet.

21 Mains 6 inches in diameter, there shall be not less than 37210 feet.

Mains 4 inches in diameter, there shall not be less than 1700 feet, and all of said pipe shall be of the best quality of cast-iron pipe of standard weight and each pipe shall be tested at its place of manufacture with hydrostatic pressure of three hundred pounds to the square inch, and shall be coated with Dr. Angus Smith's preservation paint, and laid and joined by competent mechanics in the best possible manner.

Hydrants.

The hydrants shall be double-nozzled frost-proof fire-hydrants, with nozzles fitted to connect with the hose couplings now in use by the fire department of said city of Defiance. The city council of said city of Defiance, Ohio, shall when requested by the engineer in charge of the works designate the point and points on the line of distributing mains at which the hydrants shall be erected, and no hydrants shall be erected of less diameter than 6 inches.

Gates and valves.

All necessary gates and valves shall be provided, and located at such points on the line of mains, as will enable any district to be

cut off and isolated when repairs are needed with- depriving other districts of their full supply of water.

Pumps.

The pumping machinery shall consist of two pumping engines, each capable of pumping two million gallons, or a combined capacity of four millions of gallons of water per day of twenty-
22 fours —, against the pressure needed to supply all parts of the pipe system with an adequate supply of water, and shall be arranged so as to be operated separately or together, safely against a resistance, or water pressure of 169 pounds per square inch, if necessary.

Boilers.

There shall be two return tubular boilers of ample capacity to operate the pumping engines, and shall be so arranged as to be operated separately or together, as may be required.

Stand-pipe.

There shall be a stand-pipe made of the best quality of boiler iron or steel, and it shall be not less than one hundred and forty feet high, and twenty feet in diameter.

Pump-house.

The pump or boiler house, shall be of substantial stone or brick of ample size to contain the pumps and boilers. The smokestacks shall be of brick of ample dimensions, and the building and smokestack shall be of handsome architectural design.

Source of supply.

The water shall be taken from such point as shall be free from all sewerage contamination, and shall be taken from a crib or well, and shall at all times be good wholesome water, fit for all purposes of domestic and manufacturing uses.

SEC. 3. In consideration of the public benefit, and the protection of property resulting from the construction of said system of water works the city council, of said city of Defiance, Ohio, hereby rent of the said Samuel R. Bullock and Company, their associates,
23 successors and assigns, one hundred and thirty double-nozzled, frost-proof, fire-hydrants, for the aforesaid period of thirty years at the annual rental of forty dollars per year for each hydrant, payable semi-annually, on the first day of January and July in each and every year.

The rental of all hydrants in excess of said one hundred and thirty shall be at the annual rate of thirty-five dollars for each hydrant, payable as aforesaid, during the unexpired period of said term of thirty years.

Water shall be used from the said hydrants for the extinguishing of fires, and necessary fire practice, and for flushing sewers, provided that for flushing sewers; and fire practice, no more than two hydrants

shall be opened at one time, and only when considered necessary by the chief of the fire department, and superintendent of water works, and also for all sanitary purposes, and the washing out of gutters and ditches in the streets of said city, under the control of the city council, and the superintendent of the water works.

SEC. 4. Water shall be furnished free of charge to the public and parochial schools, Defiance college, Defiance Riverside cemetary, and all public buildings used for city purposes, now erected or which may be hereafter erected during the life of this franchise, also for five public drinking fountains with openings for man and beast, and an ornamental fountain to be erected at the expense of said city in such place on line of mains as the city council may direct; also additional drinking hydrants may be erected when necessary upon the terms hereinbefore provided in this section; also all waters for the Defiance Agricultural Society, during the meetings of their annual fair only.

24 SEC. 5. The said Samuel R. Bullock and Company, their associates, successors and assigns, shall procure the organization of a water-works corporation under the laws of the State of Ohio, and may assign to it all the rights and privileges acquired hereunder. And the council of said city of Defiance, Ohio, shall pass and enact such further and other ordinances, and do and perform such other acts and things, including the repassage of this ordinance, in favor of the said corporation, as may be necessary to vest in said corporation the rights and privileges hereby and herein granted.

SEC. 6. Upon the completion of the construction of the said system of water works, according to the terms and conditions of section 2 of this ordinance, the said Samuel R. Bullock and Company their associates, successors and assigns, shall notify the city council of said city of Defiance, to that effect, and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw six fire streams through fifty feet of two-and-one-half inch hose and one-inch nozzle, from six different hydrants one hundred feet high simultaneously. On the satisfactory performance of this test to the city council of said city of Defiance, Ohio, said city council shall formally accept said system as constructed in accordance with section 2 of this ordinance.

SEC. 7. Within twenty days after the date which this ordinance takes effect, the said Samuel R. Bullock and Company their associates, successors and assigns, shall file a written acceptance thereof, in the office of the city clerk of said city of Defiance, accompanied by their bond in the penal sum of five thousand dollars, executed to the city of Defiance, Ohio, and conditioned for the faithful compliance with the terms of this section and section one of this

25 ordinance. The construction of the said system shall be commenced within sixty days after this ordinance takes effect and said system of water works shall be fully completed within one year after the commencement thereof, provided, however, that the time during which the said Samuel R. Bullock and Company their associates, successors and assigns are delayed by floods, acts of God, or

the public enemy, legal proceedings for the maintainance or defence of their legal rights, or in the acquisition of property or right of way, or by reason of any other cause whatever beyond their control, shall form no part of the time limited in this ordinance, for the performance of any act required by the term- hereof to be done by them.

SEC. 8. The said city council of said city of Defiance, Ohio, shall from time to time pass and enact ordinances under suitable penalties, providing for the protection of said works from damage, fraud or imposition.

SEC. 9. At the expiration of ten yours after this ordinance takes effect, the said city council of said city of Defiance, Ohio, shall have the right and privilege to purchase the said system of water works herein provided for. Provided, however, notice is given to the said Samuel R. Bullock and Company their associates, successors and assigns, by the city council of said city of Defiance, Ohio, of their intention so to do, at least six months before the expiration of said period of ten years. The value of said system shall be ascertained as follows to wit, the said Samuel R. Bullock and Company, their associates successors and assigns, and the said city council shall severally appoint one person, the two appointees shall choose a third, and the three persons thus chosen (who shall be hydraulic engineers), shall constitute a board to determine the value of said system of water works. None of the said board shall be residents of
26 Defiance county, or in any manner connected directly or indirectly with the said Samuel R. Bullock and Company, their associates, successors, or assigns. The said city shall within sixty days after the said board shall have rendered its decision, pay the amount in cash, or in city bonds at market value, provided that in estimating the value of said works the unexpired term of the franchise shall not be taken into consideration. A failure to so pay the award, or to give notice of its intention to purchase as above provided, shall operate as a waiver of the right to purchase until the expiration of the next preceding term of five years, and each succeeding term of five years thereafter.

SEC. 10. The said Samuel R. Bullock and Company, their associates, successors and assigns shall make extension to their line of mains, whenever called upon to do so by said council of said city of Defiance, Ohio, provided; however that said extension shall not be less than five hundred feet in length, and that one public hydrant be located on each five hundred feet or major portion thereof. But Samuel R. Bullock and Company, their associates, successors, or assigns, may voluntarily make extensions from time to time as they deem necessary.

SEC. 11. After the works are put into operation, if at any time the pressure guages located at the points hereinbefore named, shall indicate a pressure of less than 40 pounds on the distributing mains for the period of two weeks in succession, then the rental for the use and employment of the hydrants for the purposes aforesaid, shall cease until the pressure in this section provided for shall be attained provided, however, if the pressure indicated as aforesaid, should be less than forty pounds per square inch, for four calendar

months, in succession, then all the rights and privileges of the said Samuel R. Bullock and Company, their associates, successors and assigns, acquired by virtue of this ordinance, shall cease, determine, and become null and void. But nothing herein contained shall be so construed as to prevent the said Samuel R. Bullock and Company, their associates successors and assigns, from temporarily shutting off the water from its said system, or any portion thereof, for the purpose of making extensions or repairs on the same, and no liability shall attach to the said Samuel R. Bullock and Company, their associates, successros and assigns, for the suspension of the supply of water provided the repairs or extensions are made, and the water is turned on again without unnecessary delay, provided that prior to shutting off the water, due notice thereby is given to consumers of the intention so to do.

27

SEC. 12. The said Samuel R. Bullock and Company, their associates, successors and assigns, shall have the right to make all the needful rules and regulations governing the consumption of water, and tapping pipes, and general operation of the works, and to make such other rates and charges for the use of said water, as they may determine, provided that said rates and charges do not exceed the rates and charges hereinafter provided.

SEC. 13. It is hereby further ordained that the said Samuel R. Bullock and Company, their associates, successors and assigns, may charge and collect the following rates for water furnished by them, payable in quarterly installments in advance. The connections between the mains and the consumers, shall be made at the consumers' expense, and the lowest annual rates to *to* one consumer, in any case shall not be less than five dollars.

28

Annual rates.

Banks, one faucet	$8 to $10.
Bakeries, daily average of each barrel of flour used, per barrel	3.50
Do. provided no license less than	8.00
Barber shop, first chair and basin	5.50
" " each additional chair	2.50
Baths, private, without heating	3.75
" with heating	5.00
" hotels or boarding-house, one tub cold	8.00
" each additional	4.00
" public, per tub	$7 to 15.
Blacksmith shops, first fire	4.00
" " each additional fire	1.50
Building purposes, for one hundred brick	.10
Stone, per perch	.07
Plaster, per one hundred yards	.30
Boarding-house per room	1.25
Provided, no license less than	10.00
Hall, theaters and hotels, special.	
Laundries	$10 to 20.00

Offices with wash-basin	5 to 10.00
Printing offices, six hands or less	12.00
" " each additional	1.50
" " water motor, special.	
Butcher shop	$6 and up
" " but no license less than	5.00
Cigar factory, per hand	1.50
Photograph gallery	$10 to 30.00
Rooms occupied by one family, five rooms or less	5.00
" " each additional room	1.00
Stables private, including carriage-washing, one horse	2.50
29 Each additional horse	1.50
Cow each	1.50
Rest-urants	$10 to 50.00
Livery, boarding or sale stable, including carriage-washing, per horse	1.50
No. license less than	10.00
Steam boilers, per horse-power	2.50
" " large, special rates.	
Saloons, two self-closing bar faucets	15.00
" or one self-closing and one-hose bar faucet	15.00
Wash-basin, self-closing faucet	4.00
" store and shop self-closing faucets	$5 to 20.00
" stores and manufacturies combined, special.	
" urinals private, one basin self-closing faucet	4.00
" banks and offices	5.00
" rest-urants and saloons	5.00
" public	8.00
Wash-basins in dwelling, in addition to one faucet	1.00
" hotel wash-room, self-closing faucet, one basin	5.00
Sprinkling cart per day	Special
Churches	Free

Meter rates.

A daily consumption of 100 to 1000 gal. per 1000 gallons	.40
1000 to 2000 gallons per 1000 gallons	.35
2000 to 3000 " " " "	.30
3000 to 5000 " " " "	.25
5000 to 10000 " " " "	.20
Above 10000	.15

30 Season rates.

Sprinkling lawns with one-eighth-inch nozzle, four hours per day, 66 feet front or less	$5.00
Each additional foot front	.10
Street corners, lots measurement on both fronts for street sprinkling per foot front	.05

Fourtains to be used not over six hours per day for the season of six months, as follows:

½-inch jet	$8.00
¾-inch jet	16.00
1-inch jet	35.00
Soda fountains	$10 to 25.00

Purposes not mentioned, and large consumers, special.

SEC. 14. Any neglect or refusal on the part of Samuel R. Bullock and Company, their associates, successors, or assigns, after due notice shall have been given them to comply with all the requirements of this ordinance, shall cause a forfeiture of the hydrant rental until each and all of the said requirements herein provided for are complied with.

SEC. 15. This ordinance shall take effect and be in force from and after its passage and due publication.

Passed Aug. 17th, 1887.

GEO. MILLER,
President of City Council.

Attest: JAS. A. KETCHEL, *City Clerk.*

31 EXHIBIT "B."

A resolution.

Page 193.

Whereas, the city of Defiance entered into a contract with Samuel R. Bullock and Company their associates, suc-essors or assigns for erecting maintaining and operating a system of water works in accordance with the terms of an ordinance passed by the council of the city of Defiance, Ohio on the 17th day of August, 1887, which contract was as required by said ordinance, transferred to the Defiance Water Company a corporation organized under the laws of the State of Ohio, and whereas, the Defiance Water Company has completed said system of water works, in compliance with the ordinance and the official test having been made as required therefore, be it

Resolved by the council of the city of Defiance O. that the works of the Defiance Water Co. be and the same *is* hereby accepted and that the hydrant rental for same begin from and after the 5th day of March, 1889.

—— ——, *President.*

Attest: M. B. GORMAN, *City Clerk.*

(Endorsement:) 1473. Circuit ct. of U. S. N. D. O. west'n div. Defiance Water Co. *vs.* The City of Defiance & City Council of Defiance. Bill. Filed June 24, 1898. Irvin Belford, clerk. Henry Newbegin, solicitor for Defiance Water Co.

32 To the City of Defiance and the Council of the City of Defiance:

You are hereby notified that on a certain bill in equity filed against you in the circuit court of the United States for the northern district of Ohio, western division, by the Defiance Water

Company, and now pending therein, application will be made to the said court on Wednesday the 29th day of June, 1898 at ten o'clock a. m. of said day, or as soon thereafter as a hearing can be had, for an injunction to restrain you, your officers and agents, pending suit, from misappropriating or in any way applying or using to or for other purposes than to pay the accrued water rents due and falling due from said city to said water company, the monies or any part thereof of the so-called water fund already collected or to be collected pending suit. Said application will be heard upon showing made in the said bill.

HENRY NEWBEGIN,
Solicitor for Complainant.

Jun- 24th, 1898.

(Endorsement:) 1473. U. S. circuit court. N. D. O. west. div. The Defiance Water Co. *vs.* The City of Defiance and The Council of the said city. Notice of application. Filed Jun- 24 1898. Irvin Belford clerk.

The marshal will please serve this notice on the mayor of said city and on Chas. D. Harris, pres't and J. J. Malley, clerk, of said council.

HENRY NEWBEGIN,
Compl't's Solicitor.

33 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *against* THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

To the City of Defiance and the Council of the City of Defiance:

You are hereby notified that on a certain bill in equity filed against you in the circuit court of the United States for the northern district of Ohio, western division, by the Defiance Water Company, and now pending therein, application will be made to the said court on Wednesday, the 29th day of June, 1898, at 10 o'clock a. m. of said day, or as soon thereafter as a hearing can be had, for an injunction to restrain you, your officers and agents, pending suit, from misappropriating or in any way applying or using to or for other purposes than to pay the accrued water rents due and falling due from said city to said water company, the monies or any part thereof of the so-called water fund already collected or to be collected pending suit.

Said application will be heard upon showing made in the said bill.

June 24, 1898.

HENRY NEWBEGIN,
Solicitor for Complainant.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } ss:

I, Irvin Belford, clerk of the circuit court of the United States within and for said district and division, do hereby certify
34 that the foregoing contains a true and complete copy of a notice filed in the therein-entitled cause on June 24, 1898.

Witness my official signature and the seal of said court at Toledo in said district this 25th day of June, A. D. 1898, and the 122nd year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk*,
By J. W. WILSON,
Deputy Clerk.

(Endorsement when issued.)

No. 1473. United States circuit court, northern district of Ohio, western division. The Defiance Water Co. against The City of Defiance *et al.* Certified copy of notice of application for service on defendants.

(Endorsement when returned.)

U. S. Marshal's Return.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, } ss:

Received this writ on the 25th day of June, 1898, and on the same day I served the same at Defiance on the within-named The City of Defiance, by delivering a true and certified copy thereof, to John A. Diendofer, mayor of said municipal corporation, also on the same day and at the same place, on the Council of the City of Defiance, by delivering a like copy thereof, to Charles D. Harris president of the city council, also on the same day, and at the same place, on J. J. Malley, as city clerk of the city of Defiance, by delivering to him a like copy thereof.

M. A. SMALLEY,
U. S. Marshal,
By J. P. SHANNON, *Deputy.*

Fees.

Service	$6.00
Travel, 54 mi	3.24
Total	$9.24

Filed June 29, 1898.

IRVIN BELFORD, *Clerk.*

35 (Entered) FRIDAY, *July* 8, 1898.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Appearance of the City of Defiance.

Now comes the defendant The City of Defiance, by George T. Farrell, its solicitor and hereby enters its appearance in the above-entitled cause, said George T. Farrell being the attorney and solicitor of said defendant herein.

Dated this 6th day of July A. D. 1898.

GEORGE T. FARRELL,
Solicitor for the Defendant The City of Defiance, Ohio.

(Entered) FRIDAY, *July* 8, 1898.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Appearance of the Council of the City of Defiance.

Now comes the defendant The Council of the City of Defiance, consisting of the following members, to wit: Charles H. Harris, Chauncey I. Morse, Daniel F. Krotz, Daniel F. Coy, John Schnei-er, Frank X. Groselle, James H. Shulter, and Jacob D. Abele, by its counsel Henry B. Harris and John P. Cameron, and enters its appearance and the appearance of said members of said council in the above-entitled case; the said Henry B. Harris and John P. Cameron being the solicitors and attorneys for said defendant herein.

Dated July 6th, 1898.

HENRY B. HARRIS, SR.,
JOHN P. CAMERON.

36 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Demurrer of The Council of the City of Defiance to the Bill of said The Defiance Water Company, Complainant.

This defendant, The Council of the City of Defiance, by protestation, not confessing all or any of the matters and things in complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged does demur to said bill and for its causes of demurrer showeth:

(1.) That said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

(2.) That it appears by the complainant's own showing by the said bill that it is not entitled to the relief or any relief prayed for by the said bill against this defendant.

(3.) That it appears from the said bill that the said complainant has a plain and adequate remedy at law, to wit, an action against the city of Defiance on its alleged contract for the recovery of the amount it claims to be due it from said city of Defiance as set forth in said bill of complaint.

(4.) That this court has no jurisdiction to restrain at the suit of said complainant, the de-position, expenditure, or transfer by the council of the city of Defiance, or by said city, its funds or any thereof till said complainant shall have first established the validity and amount of its claim by the judgment of a court of law of competent jurisdiction; said complainant in and by its said bill showing neither a lien on or a specific interest in said funds, nor any impending or threatened irreparable loss to complainant, nor actual or impending insolvency of this defendant, or said city, nor any other ground of equity jurisdiction touching any matters complained of in complainant's bill herein.

(5.) That this court has no jurisdiction to direct or control in advance by injunction or other process thereof the legislation of the council of the city of Defiance by enjoining the disposition or transfer of municipal funds as prayed for in said bill; under the constitution and laws of Ohio the said council of said city is part of the legislative branch of the government of said State and
37 the disposition, expenditure and transfer of the municipal funds being part of the legislative discretion vested in said council, and which is not controllable by any judicial process of any court.

(6.) This court has no jurisdiction to enjoin or restrain this defendant from averring, claiming or proving in said suits mentioned and described in complainant's bill as commenced in the court of common pleas of Defiance county, Ohio, at and prior to the commencement of this suit and now pending therein; that, the alleged contract for rent of water in complainant's bill alleged to have been entered into between said city of Defiance and said complainant's assignor was never executed, and was and is illegal, *ultra vires* and void by reason that the said city was and is by the statute of the State of Ohio prohibited from making said contract.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto; and it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

HARRIS & CAMERON,
Solicitors for the City Council of the City of Defiance.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division.
THE STATE OF OHIO,
Defiance County, } *ss:*

Charles Harris makes solemn oath and says that he is the president of the city council of The City of Defiance, defendant herein; that the foregoing demurrer is not interposed for delay but because he is advised by his counsel, the counsel of the city council, that it is well founded in point of law and ought to be filed.

CHARLES HARRIS.

Subscribed in my presence and sworn to before me by the said Charles Harris this 7th day of July, A. D. 1898.

TELLIS T. SHAW,
Notary Public. [SEAL.]

I, Henry B. Harris, being counsel of the defendant The Council of the City of Defiance, in the above-named suit, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY B. HARRIS, SR.

38 (Endorsement:) No. 1473. In the circuit court of U. S. N. D. O. W. D. The Defiance Water Co. plaintiff, *vs.* The City of Defiance *et al.*, defendants. Demurrer of City Council. Filed Jul- 8, 1898. Irvin Belford, clerk. Harris & Cameron, attorneys for City Council.

39 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Demurrer of the City of Defiance to the Bill of Complaint of said The Defiance Water Company, Complainant.

This defendant, The City of Defiance, by protestation not confessing all or any of the matters and things in complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged does demur to said bill and for its causes of demurrer showeth:

(1.) That said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

(2.) That it appears by the complainant's own showing by the said bill that it is not entitled to the relief or any relief prayed by the said bill against this defendant.

(3.) That it appears from the said bill that said complainant has a plain and adequate remedy at law, to wit: an action against this defendant on its alleged contract for the recovery of the amount it claims to be due it from said city of Defiance as set forth in said bill of complaint.

(4.) That this court has no jurisdiction to restrain at the suit of said complainant, the disposition, expenditure or transfer by the council of the city of Defiance, or by said city its funds or any thereof till said complainant first shall have established the validity and amount of its claim by the judgment of a court of law of competent jurisdiction; said complainant in and by its said bill showing neither a lien on or a specific interest in said funds, nor any impending or threatened irreparable loss to complainant or actual or impending insolvency of this defendant, nor any other ground of equity jurisdiction touching any matters complained of.

(5.) That this court has no jurisdiction to direct or control in advance by injunction or other process thereof the legislation of the council of the city of Defiance by enfoining the disposition or transfer of municipal funds as prayed for in said bill.

(6.) This court has no jurisdiction to enjoin or restrain these defendants from averring, claiming and proving in said suits mentioned and described in complainant's bill as pending in the common pleas court of Defiance county, Ohio, at and prior to the commencement of this suit, that, the alleged contract for rent or water in complainant's bill alleged to have been entered into between the city of Defiance and said complainant's assignor was never executed, and was and is illegal, *ultra vires* and void by reason that the said city was and is by the statute of the State of Ohio prohibited from making said contract.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurrs thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill, and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

GEORGE T. FARRELL,
Solicitor for the Defendant The City of Defiance, Ohio.

41 THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division.

THE STATE OF OHIO,
Defiance County, } *ss:*

John A. Deindorfer makes solemn oath and says that he is the mayor of The City of Defiance, the above-named corporation, defendant herein; and that the foregoing demurrer is not interposed for delay but because he is advised by the counsel of said city that it is well founded in point of law and ought to be filed.

[SEAL.] J. A. DEINDOERFER, *Mayor.*

Subscribed in my presence and sworn to before me by the said John A. Deindorfer this sixth day of July 1898.

[SEAL.] EDWIN J. PHELPS,
Notary Public.

I, George T. Farrell, being solicitor of the defendant The City of Defiance in the above-named suit, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

GEORGE T. FARRELL.

(Endorsement:) No. 1473. In the circuit court of the United States. The Defiance Water Company *vs.* The City of Defiance and The Council of the City of Defiance. Demurrer. Filed Jul- 8, 1898. Irvin Belford, clerk. George T. Farrell, solicitor for the defendant The City of Defiance.

42 June Term, A. D. 1898, to wit, September 8, 1898.

Present: Hon. E. S. Hammond, dist. judge.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL OF the City of Defiance. } 1473. Equity.

In this cause it is ordered that the complainant have leave to file an amended bill of complaint herein in thirty days.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity. Amendments to Original Bill.

To the honorable the judges of said court:

Now comes the said Defiance Water Company, your orator, and by leave of the court first obtained for that purpose, amends its original bill, herein filed, as follows, to wit:

On the fourth page of said bill begin the last paragraph thereof with the words:

Your orator further complains and says: On the eleventh page of said bill amend the same by inserting before the last paragraph on said page, between the second and third lines from the bottom thereof and before the words "Thereupon the said Defiance Water Company went on and completed the construction of the said water works," the following:

43 Your orator further says that the said persons, the creditors of said S. R. Bullock & Co. took the assignment of the interest of said S. R. Bullock & Co. in the said property and water works

and in the said contract with the city at the special instance and request of the said city, made by its council who represented to them at the time that, unless the said water works was completed the city would be without any means whatever of extinguishing fires, as it had already provided for the abandonment of its fire-engines and other means, and was to rely upon the use of the hydrants of said water works for that purpose; and the said city council specially requested the said Dennis Long & Co., Boody, McLellan & Co. and N. T. Sprague to go on and organize the said Defiance Water Company, and to complete the construction of said water works, and then and thereby promised and agreed with them in consideration thereof that the said city would take and use the water provided by the said company, for extinguishing fires, and rent of said company the number of hyrants named therein during the term of their said contract. And relying upon the said representations of the said city, made through its council, and the promises and agreement of the said city to pay for the use of the water so furnished it as aforesaid, they did proceed to organize the said corporation and to complete the construction of the said water works.

On the fourteenth page of said bill amend the same by adding at the end of the first paragraph, between the sixteenth and seventeenth lines of said page, after the words "And it is still so furnishing all the water to said city and the public required by said ordidance and contract," the following:—

44 And in accordance with their terms, that many of said additional hydrants were put in to the said water works by your orator in accordance with the said contract, long after the said water works had been erected and accepted by the said city, and the company's mains have been extended for that purpose upon the special requests and orders of the said city and for its use.

On the fifteenth page of said bill amend the same by inserting in the fifth line from the top of said page, between the figures "1896" and the word "passed" the words:—

without any prior or subsequent notice thereof given to your orator.

On the said fifteenth page of said bill amend the same by adding to the next to the last paragraph, between the fifth and sixth lines from the bottom of said page after the words "for the last half of the year 1897 the sum of $3142.50" the following:—

and that thereafter during the term of the said contract there will become due and payable at the end of each six months, from said city to your orator for the rent of said hydrants, the sum of $3142.50.

On the sixteenth page of said bill amend the same by inserting at the end of the first paragraph, between the thirteenth and fourteenth lines, after the words "and it has never offered to purchase them in accordance with the said terms, or otherwise," the following:—

And by that means and by the public and general denial of the said defendants that your orator has a contract existing between them, the said defendants have induced many of the consumers of

water heretofore furnished by your orator, to abandon its use, and they have thereby largely depreciated and are depreciating the value of your orator's said property.

45 On the seventeenth page of said bill amend the same by inserting in the fourth line between the words "suit" and "and," the words,

in the court of common pleas of Defiance county.

On the eighteenth page of said bill amend the same by inserting in the fifth line, between the words "water" and "that" the words:

at its special demand and requests as aforesaid.

Wherefore your orator prays that the said amendments may be taken and held to be a part of your orator's original bill herein, and that the said defendants may be required to make full, true and direct answer thereto, but not under oath, answer under oath being expressly waived. And your orator further prays as it has heretofore prayed in its original bill of complaint, etc.

THE DEFIANCE WATER COMPANY,
By HENRY NEWBEGIN, *Solicitor.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Defiance County, } ss:

Henry Newbegin, being first sworn, states that he is counsel and solicitor for The Defiance Water Company, complainant in the foregoing amendments to its bill of complaint, that he has read the same and knows the contents thereof, and that the allegations therein are true as to the best of his knowledge, information and belief.

HENRY NEWBEGIN.

Sworn to before me and in my presence subscribed this 21st day of September A. D. 1898.

[SEAL.]

BENJ. J. KINGSBURY,
Notary Public, Defiance County.

46 (Endorsement:) Circuit court of United States, N. D. O. west. div. No. 1473. Defiance Water Co. *vs.* City of Defiance & Council of City of Defiance. Amendments to original bill. Filed Sep. 23, 1898, Irvin Belford, clerk. Henry Newbegin, solicitor.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Plaintiff,
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Demurrer of the City of Defiance to the Original Bill and the Amendments Thereto.

This defendant The City of Defiance, by protestation, not confessing all or any of the matters and things in complainant's bill of

complaint contained to be true in such manner and form as the same are therein set forth and alleged does demur to said bill and for its causes of demurrer showeth :—

(1.) That said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

(2.) That it appears by complainant's own showing by the said bill that it is not entitled to the relief or any relief prayed for by the said bill against this defendant.

47 (3.) That it appears from said bill that the said complainant has a plain and adequate remedy at law, to wit: an action against the city of Defiance on its alleged contract for the recovery of the amount it claims to be due it from the said city of Defiance as set forth in said bill of complaint.

(4.) That this court has no jurisdiction to restrain at the suit of said complainant the disposition, expenditure or transfer by the council of the city of Defiance or by said city, its funds or any thereof till said complainant shall have first established the validity and amount of its claims by judgment of a court of law of competent jurisdiction said complainant in and by its bill showing neither a lien on or a specific interest in said funds nor any impending or threatened irrepa-ble loss to complainant, nor actual or impending insolvency of this defendant, The City of Defiance, nor any other grounds of equity jurisdiction touching any matters complained of in complainant's bill herein.

(5.) That this court has no jurisdiction to direct or control in advance by inju-ction or any other process thereof the legislation of the council of the city of Defiance by enjoining the disposition or transfer of municipal funds as prayed for in said bill, under the constitution and laws of Ohio the said council of said city is part of the legislative branch of the government of said State and the disposition, expenditure and transfer of the municipal funds being part of the legislative discretion vested in said council, and which is not controllable by any judicial process of any court.

(6.) This court has no jurisdiction to enjoin or restrain this defendant from averring, claiming or proving in said suits mentioned and described in complainant's bill as commenced in the court of common pleas of Defiance county, Ohio, at and prior to the

48 commencement of this suit and now pending therein, that, the alleged contract for rent of water in complainant's bill alleged to have been entered into between said city of Defiance and said complainant's assignor was never executed, and was and is illegal, *ultra vires* and void by reason of that the said city was and is by the statute of the State of Ohio prohibited from making said contract.

Wherefore, and for divers other good causes of demurrer appearing in said bill and amendments thereto, this defendant demurs thereto; and it prays the judgment of this honorable court whether it shall be compelled to make answer to said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

THE CITY OF DEFIANCE,
By GEO. T. FARRELL, *Its Solicitor.*

THE STATE OF OHIO, } ss:
Defiance County, }

George T. Farrell, being duly sworn, says that he is the duly elected, qualified and acting city solicitor of the defendant, The City of Defiance; and that the foregoing demurrer is not interposed for delay.

GEO. T. FARRELL.

Sworn to before me and subscribed in my presence this 18 day of October A. D. 1898.

[SEAL.] TELLIS T. SHAW,
Notary Public.

I hereby certify that the foregoing demurrer, is in my opinion well founded in point of law.

GEORGE T. FARRELL,
Counsel for the Defendant The City of Defiance.

49 (Endorsement:) No. 1473. U. S. circuit court, northern dist. of Ohio, western division Defiance Water Co. *vs.* The City of Defiance *et al.* Demurrer of The City of Defiance. Filed Oct. 19, 1898. Irvin Belford, clerk.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *against* THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance, Defendants. } No. 1473. In Equity.

Demurrer of the Council of the City of Defiance to the Original Bill and the Amendments Thereto.

This defendant, The Council of the City of Defiance, by protestation, not confessing all or any of the matters and things in complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged does demur to said bill and for its cause of demurrer showeth:

(1.) That said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

(2.) That it appears by the complainant's own showing by the said bill that it is not entitled to the relief or any relief prayed for by the said bill against this defendant.

(3.) That it appears from the said bill that the said complainant has a plain and adequate remedy at law, to wit: an action
50 against the city of Defiance on its alleged contract for the recovery of the amount its claims to be due it from the said city of Defiance as forth in said bill of complaint.

(4.) That this court has no jurisdiction to restrain at the suit of

said complainant the disposition, expenditure, or transfer by the council of the city of Defiance, or by said city, its funds or any thereof, till said complainant shall have first established the validity and amount of its claim by the judgment of a court of law of competent jurisdiction; said complainant in and by its said bill showing neither a lien on or a specific interest in said funds nor any impending or threatening irreparable loss to complainant, nor actual or impending insolvency of this defendant, or said city, nor any grounds of equity jurisdiction touching any matters complained of in complainant's bill herein.

(5.) That this court has no jurisdiction to direct or control in advance by injunction or other process thereof the legislation of the council of the city of Defiance by enjoining the disposition or transfer of municipal funds as prayed for in said bill; under the constitution and laws of Ohio the said council of said city is part of the legislative branch of the government of said State and the disposition, expenditure and transfer of the municipal funds being part of the legislative discretion vested in said council, and which is not controllable by any judicial process of any court.

(6.) This court has no jurisdiction to enjoin or restrain this defendant from averring, claiming or proving in said suits mentioned and described in complainant's bill as commenced in the court of common pleas of Defiance county, Ohio, at and prior to the commencement of this suit and now pending therein; that, the alleged contract for rent of water in complainant's bill alleged to
51 have been entered into between said city of Defiance and said complainant's assignor was never executed, and was and is illegal, *ultra vires* and void by reason that the said city was and is by the statute of the State of Ohio prohibited from making said contract.

Wherefore, and for divers other good causes of demurrer appearing in said bill and amendments thereto, this defendant demurs thereto; and it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

THE COUNCIL OF THE CITY OF DEFIANCE,
By HARRIS & CAMERON, *Their Att'ys.*

THE STATE OF OHIO, } ss:
Defiance County, }

D. W. Coy, being first duly sworn says that he is one of the members of the city council of the city of Defiance. The foregoing demurrer is not interposed for delay.

D. W. COY.

Sworn to before me this 18th day of October, A. D. 1898.
[SEAL.]
TELLIS T. SHAW,
Notary Public.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

HENRY B. HARRIS, Sr.,
Of Counsel for Defendant The City Council.

(Endorsement:) No. 1473. In the circuit court of the United States, northern district, western division. The Defiance Water Co. plaintiff *vs.* The City of Defiance *et al.*, defendants. Demurrer of The Council of the City of Defiance. Filed Oct. 19, 1898. Irvin Belford, clerk. Harris & Cameron, attorneys.

52 June Term, A. D. 1898, to wit, November 23, 1898.

Present: The Honorable Henry F. Severens, U. S. district judge sitting by designation.

THE DEFIANCE WATER CO.
vs.
THE CITY OF DEFIANCE ET AL. } 1473. Equity.

It is hereby ordered that this case, No. 1473, be, and the same hereby is, continued to the next term of this court.

53 1473. *Opinion, Dec.* 30, '98.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Complainant,
vs.
THE CITY OF DEFIANCE and THE COMMON COUNCIL OF THE CITY of Defiance, Defendants.

On demurrer to the bill of complaint.

The conclusion which I reach in this case is that the demurrer should be overruled. There are three principal questions involved in this determination, which are decided as follows:

1. Was it necessary that the city at the time of entering into the contract for water should have had in its treasury, or should have had in course of collection the funds necessary to meet the expenditure contemplated by the contract, as provided for by the section of the Ohio statutes in that behalf—being section 2702? My opinion is that the statute did not apply to the contract in question, and that there is no objection to the contract by reason of any requirement of the statute referred to. No payment was to become due for a considerable time and the statute does not intend that the money shall be collected and hoarded for the expenses of the city in future years.

2. Was it necessary to the validity of the said contract that it should have been ratified by a vote of the electors, as was required by the act of January 29th, 1885, being section 2434 of the statutes? I think this question must be answered in the negative, my opinion being that the act of May 4th 1885, as amended by the act of May

12th, 1886, relating specially to a certain grade of cities, to which the city of Defiance belongs, must be regarded as having superseded to the extent of the cities of that grade the general provisions of the statute of January 29th, 1885. The general act prescribed no limitation in regard to the time for which such contract might be made. The special acts of May 4th, 1885 and May 12th, 1886 limited the time to a term not exceeding twenty years. The term for
54 which the contract might be made being short, it may well be that the legislature should have thought so much precaution was not necessary as if the time had been for a protracted period. The contract was in terms for a period of thirty years, but as its stipulations are to be performed annually and it is separable by years, I think the contract is valid for twenty years from its date. A somewhat similar question was presented to the Supreme Court of the United States in the case of the City of Walla Walla *vs.* The Walla Walla Water Company, 171 U. S. — (not yet published officially), where the city relied upon the provisions of a general act which it was contended was by implication carried into the special act which gave the city power in general terms to provide itself with water. In my judgment the reasons for regarding the special act referred to in that case as sufficient to carry the power without limitation from the general law were not more cogent than they are here.

3. With respect to the question of the jurisdiction of this court sitting in equity I think there can be no reasonable doubt. The defendants are threatening to carry into effect an ordinance or resolution of the city which is manifestly designed to destroy the efficacy of the contract of August 17th, 1887. The authorities upon this subject are collected, and the doctrine stated in the above-mentioned case of the City of Walla Walla *vs.* The Walla Walla Water Company.

The demurrer will accordingly be overruled, and the defendants be allowed to answer if they shall so elect.

H. F. SEVERENS,
U. S. Dist. Judge, under Designation.

(Endorsement:) 1473. Circuit court of the United States northern district of Ohio, western division. The Defiance Water Company, complainant, *vs.* The City of Defiance, and The Common Council of the City of Defiance, defendants. Opinion of the court on demurrer to bill of complaint. Filed. Dec. 30 1898. Irvin Belford, clerk.

55 (Entered) TUESDAY, *January* 24, 1899.

THE DEFIANCE WATER CO.
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

The said cause having been heretofore, submitted to the court upon the complainant's bill and the several demurrers of the said defendant- thereto and the same taken by the court under advisement, and the court having considered the said demurrers and the

said bill and coming now this 21st day of January, A. D. 1899; to determine the same does find and determine that the said demurrers or either thereof are not well taken, and that they and each of them should be overruled; but the court does further find that the said defendants interposed said demurrers in good faith and that the same were not interposed vexatiously or for delay, and the request of the said defendants being noted for leave to answer or to answer and file plea to said bill the same is allowed as requested, and the said defendants are allowed until the last Saturday in February in the year 1899 to file their said answers or answers and plea.

It is therefore considered and adjudged that the several demurrers of the said defendants to the bill of the said complainant be overruled, and that the costs thereon incurred abide the final determination of this action and the order and decree of this court; that said defendants on their motion have leave to and they are hereby ordered to answer to said bill or to file answer and plea to said bill, as they may be advised, on or before February 25th, 1899.

(Endorsed:) "Approved for entry H. F. Severens, dist. judge. Jan. 21, 1899."

56 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *vs.* THE CITY OF DEFIANCE and THE Council of the City of Defiance. } No. 1473. In Equity. Application to File Supplemental Bill.

To the Honorable Henry F. Severens, one of the judges of the circuit court of the United States of the northern district of Ohio, western division, by designation:

Your petitioner The Defiance Water Company, prays that leave may be granted it to file the supplemental bill hereto annexed in the said suit, and that a rule may be entered in said suit requiring the defendants to answer thereto.

HENRY & ROBERT NEWBEGIN,
Solicitors for the Complainant,
The Defiance Water Company.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *against* THE CITY OF DEFIANCE and THE Council of the City of Defiance. } No. 1473. In Equity. Supplemental Bill.

To the honorable the judges of the said court in chancery sitting:

The said The Defiance Water Company, your orator, complaining against the said defendants, showeth unto your honors that
57 since the filing of the original bill herein, and since the order of the court overruling the separate demurrers of the

said defendants to the said original bill, to wit: on the 16th day of January A. D. 1899, at the term of the court of common pleas of Defiance county, State of Ohio, for November A. D. 1898, the said court dissolved the temporary injunction, theretofore by it allowed in said suit pending therein, of the said City of Defiance against the said Council of the City of Defiance, and your orator and the said Defiance Water Company, and at the same time sustained the demurrer of your orator to the petition of said plaintiff and rendered final judgment in said suit, dismissing the said petition at the costs of the said plaintiff The City of Defiance as will fully appear by reference to Exhibit A hereunto annexed and made a part of this supplemental bill.

Said suit, temporary injunction and order of the said court of common pleas allowing it, is fully set forth in your orator's original bill, pages 2 to 5 inclusive.

Your orator further complaining says that at a session of the council of the said city of Defiance, on the 17th day of January A. D. 1899 it presented its bill for accrued water rents due it from said city to date, and requested the same might be allowed and paid, there being moneys in the treasury of the said city applicable to the payment of the same, as the council was fully aware, notwithstanding which the said council refused to consider or entertain the question of payment of said bills or to pay the same.

Wherefore your orator prays that upon the final hearing hereof an account may be taken of the amount due your orator from the said city of Defiance for accrued water rentals etc. and it further prays as in its original bill it has heretofore prayed.

HENRY & ROBERT NEWBEGIN,
Solicitors for the Complainant, The Defiance Water Company.

58 UNITED STATES OF AMERICA, *Northern District of Ohio, Defiance County,* } ss:

Henry Newbegin, being first duly sworn, says that he is the general attorney and counsel for the said Defiance Water Company, and that the facts set forth in its foregoing supplemental bill are true as he verily believes.

HENRY NEWBEGIN.

Sworn to before me and in my presence subscribed this 19th day of January A. D. 1899.

[SEAL.]

K. V. HAYMAKER,
Notary Public in and for said County.

EXHIBIT A.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE Defiance Water Company. } No. 6841.

This day this cause came on to be heard upon the demurrer of the said defendant, The Defiance Water Company to the petition of the plaintiff and the same having been argued by counsel and the court fully advised in the premises, the court is of the opinion that the said demurrer is well taken and ought to be sustained. It is therefore ordered that said demurrer be and the same is hereby sustained; and it is further ordered that the temporary injunction hereinbefore allowed be & the same is hereby dissolved. And the plaintiff not asking to amend its petition, on motion of the said defendant, The Defiance Water Company it is further ordered and adjudged that the said petition be and the same is hereby
59 dismissed and that the said defendant recover its costs herein by it expended and taxed at $— and that the plaintiff pay its own costs herein made.

Thereupon came the plaintiff by George T. Farrell its city solicitor and gave written notice of its intention to appeal this suit to the circuit court of this county and the court fixes the bond for that purpose at the sum of one hundred dollars.

THE STATE OF OHIO, } *ss:*
Defiance County, }

I, W. A. Smaltz, clerk of the court of common pleas of said county do hereby certify that the above and foregoing is a true copy of an order and judgment of the said court made and rendered in the above-entitled case on the 16th day of Jan'y A. D. 1899 and at the November term of said court, A. D. 1898.

Witness my hand and the seal of said court on the 18th day of January A. D. 1899.

[SEAL.]

W. A. SCHMALTZ,
Clerk of Courts, Defiance, O.

(Endorsement:) 1473. The Defiance Water Co. *vs.* The City of Defiance and Council etc., U. S. circuit court northern dist. of Ohio western division. Supplemental bill. Leave to file the within supplemental bill is granted. Let an order requiring defendants to answer be entered. Jan. 23d, 1899. H. F. Severens, dist. judge. Filed Jan. 24, 1899. Irvin Belford, clerk. Henry and Robert Newbegin, attorneys and counsellors at law, Defiance, Ohio.

60 (Entered) TUESDAY, *January* 24, 1899.

THE DEFIANCE WATER CO.
vs.
THE CITY OF DEFIANCE and COUNCIL OF the City of Defiance. } No. 1473. In Equity.

Upon application of the complainant herein, leave is hereby given to said complainant to file supplemental bill herein, and said defendants are hereby ordered to answer the same on or before February 25th, 1899.

61 1473. *Copy Joint & Several Plea. Filed Feb'y* 25, '99.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance, Defendants. } No. 1473. In Equity.

The joint and several plea of The City of Defiance and The Council of the City of Defiance, defendants, to the bill of complaint of The Defiance Water Company, complainant herein.

These answering defendants, not confessing all or any of the matters and things in said bill and the amendments and supplements thereto contained to be true as therein alleged, and not waiving their demurrers heretofore filed herein, but wholly relying thereon, plead to that part of said bill wherein said complainant avers and sets forth the grounds which it alleges entitled this court to take and maintain jurisdiction of this action and wherein complainant sets forth the constitutional provisions that it claims have been invaded and by reason of which it claims this court has power, to hear and determine this controversy between the parties heteto, who are all citizens of the State of Ohio, viz. the 17th, 18th and 19th, paragraphs of said bill, being that part thereof commencing with the 17th line of the fourth page and extending to and including the 18th line of the fifth page of said bill; also the last paragraph of the first page of the amendment to said bill, being that part thereof, commencing with the words "your orator" in the 21st line of the first page and extending to and including the words "water works" in the thirteenth line of the second page of said amendment; also the twenty-fifth paragraph of said bill, being the first paragraph on the eighth page thereof; also the third paragraph on the second page of said amendment being that part thereof, commencing with the words "that many" on the twenty-first line of said second page, extending to and including the words "for its use" in the twenty-second line of
62 said second page of said amendment; also the thirty-second paragraph of said bill, being that part thereof commencing with the fourteenth line of the tenth page of said bill and extending

to and including the twenty-sixth line of said page, together with the amendments thereto of September 22nd, 1898; also the thirty-fourth paragraph of said bill, being that part thereof commencing with the thirty-second line of the said tenth page and extending too and including the word "public," at the beginning of the ninth line of the eleventh page; also the thirty-seventh paragraph of the said bill, being that part commencing with the ninth line of the twelfth page and extending to and including the fifteenth line of said twelfth page; also the last sentence of the thirty-eighth paragraph of said bill, being that part commencing with the words "that the passage" in the twenty-eighth line of said twelfth page and extending to and including the thirty-second line of said page; the foregoing being that part of said bill and of the amendments thereto, which is in the words and figures following:—

"Further complaining your orator says:—That on the 17th day of August, A. D. 1887, the defendant corporation, the said City of Defiance, duly passed an ordinance entitled 'An ordinance to authorize and provide for the construction and maintenance of a system of water works in the city of Defiance, Defiance county Ohio.' A copy of which said ordinance is hereunto annexed as Exhibit 'A,' and hereby made a part of this cross-bill.

"That by the terms of said ordinance in section first the right and privilege for the period of thirty years thereafter was granted unto the said Samuel R. Bullock & Company, their associates, successors and assigns 'of locating and operating a system of water works, in said city in accordance with the provisions of the ordinance,' and of using the streets of said city for the purpose thereof, and for laying their pipes, conduits and hydrants therein, the same being in consideration of the public benefit to be derived therefrom.

"That by the terms of section three of said ordinance it was contracted by and between the said city of Defiance through the said city council that the said city should, and did thereby rent of the said Samuel R. Bullock & Company, their associates, successors and assigns, 'one hundred and thirty double-nozzeled frost-proof water hydrants for the aforesaid period of thirty years at the annual rental of forty dollars for a year each hydrant, payable semi-annually on the first day of January and July in each and every year,' and that the city should have the right and privilege of the rental of any other hydrants it might wish, to be constructed by the said Samuel R. Bullock and Company and its assigns upon demand of said city at the rate of thirty-five dollars per year for each and every hydrant, payable as aforesaid and during the unexpired period of said
63 term of thirty years. The water through said hydrants, under the terms of said contract, *were* to be used by the said city for the extinguishing — fires, necessary fire practice, for flushing the sewers thereof, 'and also for all sanitary purposes and the washing out of the gutters and ditches of the streets of said city, under the control of the said council and the superintendent of the water works.'

"Your orator further says that the said persons, the creditors of

said S. R. Bullock & Co. took the assignment of the interest of said S. R. Bullock & Co. in the said property and water works and in the said contract with the city at the special instance and request of the said city, made by its council who represented to them at the time that, unless the said water works *was* completed, the city would be without any means whatever of extinguishing fires, as it had already provided for the abandonment of its fire-engines and other means, and was to rely upon the use of the hydrants of said water works *for that purpose; and the* said city council specially requested the said Dennis Long & Co., Boody, McClellan & Co., and N. T. Sprague to go on and organize the said Defiance Water Company, and to complete the construction of said water works, and then and thereby promised and agreed with them in consideration thereof that the said city would take and use the water provided by the said company, for extinguishing fires, and rent of said company the number of hydrants named therein during the term of their said contract. And relying upon the said representations of the said city, made through its council, and the promises and agreement of the said city to pay for the use of water so furnished it as aforesaid, they did proceed to organize the said corporation and to complete the construction of the said water works.

"Thereupon the said Defiance Water Company went on and completed the construction of the said water works in accordance with the terms of said ordinance and said contract with the said city of Defiance, to the entire satisfaction of said city and its council, so that the said water works stood and performed the test as above set forth and required by the said city council; and the same were by resolution of the said city council, passed on the 5th day of March, A. D. 1889, accepted, as will appear from a copy of said resolution hereto annexed as Exhibit 'B.'

"That many of said additional hydrants were put into the said water works by your orator in accordance with the said contract, long after the said water works had been erected and accepted by the said city, and the company's mains have been extended for that purpose upon the special requests and orders of the said city and for its use.

"Notwithstanding which, the said city council at its regular meeting, January 7th, 1896, without any prior or subsequent notice thereof given to your orator, passed an ordinance or resolution in substance rescinding and annulling said contract of the city with the Defiance Water Company, your orator, so far as it had power so to do, and providing by the terms of said ordinance or resolution, by which it should allow the bill of said water company for the rents that had accrued to them from said city for the last half of the year 1895, that the payment of the said bill should not be construed or taken to be any acknowledgement of any contract between them and the said city for said water rental or in any manner implying any actual performance of an alleged contract and that no further payment at the present rate be made to the said company. * * *

"Your orator further says that it is informed and believes and hence so charges that the said council and the several members

of it ever since the passage of said resolution or ordinance of January 7th, A. D. 1896, have claimed and repeatedly
64 stated and given out to the public generally that the said city has no such contract as aforesaid for furnishing water to it by the said The Defiance Water Company, and that they have also passed resolutions and ordinances looking toward the construction of water works by the said city for furnishing it and supplying it and its citizens, the public generally, with water in the same manner and for the same purposes your orator has now been supplying it under its said contract, and the public. * * *

"That if said order of injunction shall stand and be made perpetual the said City and Council of Defiance, said defendants will thereby deprive your orator of its property without due process of law and by means of said order of injunction they will confiscate your orator's property and convert it to their own use without payment therefor and without trial by jury, contrary to the provisions of the Constitution of the United States. * * *

"That the passage of said ordinance or resolution and the attempt thereby to abrogate and annul said contract contravenes the provisions of section 10 of article 1 of the Constitution of the United States, in this, that they are laws impairing the obligation of their said contract with your orator."

and for cause of their said plea thereto do aver and say that The Defiance Water Company is a corporation organized under the laws of the State of Ohio under said corporate name The Defiance Water Company, with its office and place of business at Defiance, Ohio; that the city of Defiance in August, 1886, was, since has been and now is a municipal corporation of the State of Ohio, a city of the fourth grade of the second class; that the city council of said city now consists of the eight persons named in said complainant's said bill, and that at the commencement of this suit they and all the other parties to this action were and are now residents and citizens of said city of Defiance, in the county of Defiance, in the State of Ohio.

That the said ordinance, which is alleged to constitute the contract between the city of Defiance and the Defiance Water Company never was submitted for ratification to a vote of the electors, as required by section 2434 of the Revised Statutes of Ohio; and that the act of May 12th, 1886, (83 O. L. 146) empowers a city of the class to which the defendant, The City of Defiance belongs, to contract for a supply of water for a period not exceeding twenty years only; and for that period only when ratified by the vote as aforesaid; that the alleged contract was not in terms exclusive, and was not intended so to be, and that the creation of an exclusive
65 franchise for the supply of water to the public is prohibited by the laws of Ohio:

And the said defendants for further cause of their said plea do aver and say, that prior to the bringing of this suit its said city solicitor, in pursuance of his legal duty, under section 1777 of the Revised Statutes of Ohio, brought suit, as alleged in complainant's

bill, to restrain and perpetually enjoin the defendant council from paying complainant any and all claims for water rents that had accrued to it against the defendant; that the complainant (defendant in the said suit) attempted to remove the cause to this circuit court of the United States, on the ground that a Federal question was involved, which petition for removal was refused by the court and said cause remanded on the 24 day of June 1898; that the said suit is still pending and undetermined in the said State courts, and that the present proceeding is simply an attempt to secure the privilege which has already been refused to complainant, of removing the cause from the said State to the Federal court.

And the defendants for further cause of their said plea do aver and say that during and for a long time prior to the month of January, 1896, said complainant had not supplied the city of Defiance, or its citizens with good, wholesome water fit for all purposes of domestic and manufacturing uses or even fit or suitable for use for fire purposes. But said company had during all said time furnished such foul, dirty, muddy, unwholesome water that the same could not be used for drinking, cooking bathing or for any domestic purposes or for many manufacturing purposes, but was so foul, muddy and unwholesome that it was most of the time wholly useless and so that it would oftentime by reason of the mud and dirt therein, clog up and stop the water pipes, cocks, hydrants and waste pipes, and was even so unfit and unsuitable for fire purposes that the fire hose and nozzles would be and were stopped up with mud and filth in all attempts to use said water for fire purposes. That oftentimes the fire-hydrants and water mains would be and were so
66 clogged and stopped up with mud, dirt and filth pumped into them by said complainant that the fire-hose could not be attached to said hydrants or said hydrants used for fire purposes, until after the mud, dirt, and filth were allowed to run out of said hydrants and mains. That said company had not maintained a pressure of water of forty pounds to the square inch, but had maintained and kept a much lower pressure, so low, in fact that oftentimes when said water was necessary for use in extinguishing fire a stream of water could not be thrown by means of hose and nozzel attached to said hydrants into the second story of an ordinary building; and said water supply was practically worthless for fire purposes.

That the water was frequently frozen in said fire-hydrants and said hydrants and said water supply *was* often useless by reason thereof. All of which facts were well known to said complainant; but none thereof were remedied by it, although said city made frequent demands on said complainant for good, wholesome water, fit for domestic and fire purposes, and that it furnish sufficient pressure for fire purposes, and that it furnish frost-proof hydrants as aforesaid, and frequently notified said company to comply with said alleged ordinance, but said demands and notices were ever disregarded; although said company by the terms of said alleged ordinance and contract had promised to furnish and by said ordinance it is stipulated and provided that said company would furnish at all times good, wholesome water fit and suitable for all domestic and

manufacturing uses, and that it would maintain sufficient pressure for fire purposes and never less than forty pounds to the square inch, and that it would furnish frost-proof fire-hydrants. That while said conditions were still existing, viz. shortly before the 7th day of January, 1896, the said complainant presented a bill to the city council of said city of Defiance for the sum of three thousand one hundred and sixty dollars for the city's water rent and use of fire-
67 hydrants for the last six months of the year 1895, That said bill was for the full amount named in said original ordinance for said semi-annual rental, although said company had not in any particular complied with the provisions of said ordinance, which it claims constitutes the contract between it and said city of Defiance; but had failed in every particular to do so. And then, for the first time it came to the knowledge of said city or any of its officers or councilmen that said alleged contract might be illegal and void, because it had never been ratified by the vote of the electors of said city and that said alleged contract might be illegal and void, because it was made for a term of more than twenty years contrary to the provisions of the statutes of Ohio.

At said meeting of said city council on the 7th day of January, 1896, the general manager of said company came before said council to procure the allowance of said water company's said bill, and then and there urged the allowance of said water company's said bill, plead the pressing needs of said company, promised to furnish good water, sufficient pressure and efficient service in the future, and stated that the city should not waive any rights or incur any obligations to said company by making said payment and to evidence that understanding and to give said company the formal notice prescribed by section 14 of said ordinance of August 17th, 1887, said resolution of January 7th, 1896, was drafted with the knowledge and assistance of said company's said manager, one G. M. Eldridge, and was then and there presented to said council. Thereupon said city council, desiring and intending not to waive any rights of the city by the unconditional payment of money under said alleged contract after the city had knowledge of the invalidity thereof, but for the purpose of protecting and securing the rights of said city and its citizens to challenge the validity of said alleged contract in the future if it should be necessary to do so, and desiring and intending to again notify said company, that it was not complying with the requirements of said ordinance and that the former
68 inefficient service must be discontinued and a sufficient water supply furnished and that said payments, if accepted should not be any admission of compliance with said ordinance and that no further payments at the present rate be made to said company, as prescribed by sec. 14, of said ordinance of August 17th, 1887, which provides:—

"SECTION 14. Any neglect or refusal on the part of Samuel R. Bullock & Company, their associates, successors or assigns after due notice shall have been given them to comply with all the requirements of said ordinance, shall cause a forfeiture of the hydrant

rental, until each and all of the said requirements herein provided for are complied with."

Said city council voted in favor of said resolution of January 7th, 1896, referred to in said complainant's bill, (a true copy of which resolution together with all the proceedings of said council touching the same is attached to and filed with this plea and marked Exhibit "A," and which defendants pray may be read and treated as part of this plea.) That said city or said city council did not by said resolution repeal, annul, abrogate or impair or intend to repeal, annul, abrogate or impair the said alleged ordinance of 1887, or any part thereof or the contract, or any part thereof alleged to have been made thereby; but, on the contrary pursuant to the terms of said resolution the said claim of said water company for $3160.00 was placed on the claim ordinance of said city and said ordinance was duly passed by said council on said 7th day of January, 1896, and said bill thereby ordered, paid, and the same was paid to said complainant as were all bills presented by said water company to said council, for the semi-annual installments of water and hydrant rent under said alleged contract up to the time a bill was presented by said company in January, 1898, for water and hydrant rent for the last half of the year 1897, in all four installments being paid by said city after the 7th day of January, 1896, that before the said complainant's bill for the amount of the last half of water rent for the year 1897 was presented to said city council the said council had been restrained from allowing or paying said bill in said suit
69 brought by the said city solicitor mentioned in complainant's bill herein.

Said defendants further aver that said enactment was and is not an ordinance, but merely a resolution. That said enactment was not read on three different days in said council and that the reading thereof on three different days was not dispensed with by said council, that said resolution was never published or posted; that no action or proceeding touching or relating to said resolution *were* ever had in or by said council other than those hereinabove set forth, and none whatever on any other day than said January 7th, 1896.

That no ordinance or ordinances relative to the water supply of said city have been passed by said council since the construction of said water works except those providing for paying the water company's bill.

That the only other resolutions passed or proceedings had or taken in or by said city council relating to, said water supply or with reference to or touching said water company or its relation to said city were,

(1.) A so-called resolution entitled "*Resolution declaring it necessary to issue bonds for the purpose of providing means for the payment of the costs and expense of erecting or purchasing water works,*" which was introduced into, and voted on in said city council on December 6th, 1895, (a true copy of which together with all the proceedings f the council relating thereto is hereto attached, filed with this plea nd marked Exhibit "B" and which defendants pray may be read

and treated as a part of this plea). But these defendants aver that said resolution was never read on three different days in said council, that the reading thereof was not dispensed with by said council, and for that reason said so-called resolution was never passed and was not and is not a law and is not and never was of any force or effect whatsoever, but was and is absolutely void.

(2.) A resolution passed by said city council on the 12th
70 day of March, 1897, (a true copy of which is attached to and filed with this plea, and marked Exhibit "C" and which defendants pray may be read and treated as a part of this plea.)

(3.) An order passed by the said city council on the 20th day of April, 1897, directing the city clerk to communicate with The Defiance Water Company, complainant herein, and ascertain if said company would sell its water system to this city and if so at what price; and said city clerk's report to said city council made on the 1st day of June, 1897, (a true copy of which said order is hereto attached and filed herewith and marked Exhibit "D," and a copy of which report is hereto attached, filed herewith and marked Exhibit "E," which exhibits defendants pray may be read and treated as a part of this plea); and,

(4.) Certain requests which said city made at various times since January, 1896, that said water company construct specific extensions of its water mains for the convenience of certain citizens of said city.

That any or all of said proceedings by said city council did not impair or tend to impair the obligations of said alleged contract; but were had and taken for the purpose of investigating, if it would be advisable or possible for said city to make some satisfactory arrangement for an adequate supply of wholesole water, and if it would be possible to raise funds in order to accomplish that object; and if said water company would sell its water system and if so at what price, and to obtain additional water service from said company. That said making of inquiries and investigation to learn if an adequate water supply could be obtained and sufficient service guaranteed for the city and its citizens, or if funds could be raised for that purpose, and the securing of additional conveniences from said company is not repugnant to the provisions of the constitution referred to by complainant, or to any other constitutional provision; that none of said proceedings impaired or attempted to
71 impair the obligations of said alleged contract.

That neither the interlocutory order of said probate judge acting therein as a common pleas judge, in said suit brought by said city solicitor in said State court nor the prosecution of said action in said court is nor would the recovery of a final judgment therein be within the constitutional inhibitions of section 10 of article 1, of the Constitution of the United States or any other constitutional provisions; as the said action of said probate judge, the bringing and prosecution of said suit by said city solicitor and a final judgment and decree in such an action so brought and prosecuted in a court of equity, had been expressly authorized and provided for by the statutes of Ohio, in force at and prior to the time the said al-

leged contract set forth in said complainant's bill is claimed to have — made.

Said defendants deny that said city council by its said resolution of January 7th, 1896, "in substance," or in fact "rescinded or annulled said alleged contract with said water company so far as it had power so to do," or at all; and they deny that said resolution, voted on as it was, was or could be subject to the constitutional inhibition urged and set forth by said complainant in its said bill; and avers that it was not and is not a law impairing any obligation of said alleged contract between said complainant and said city and did not and does not contravene all or any of the sections of the Federal Constitution referred to in the complainant's bill.

That, in so far as the preamble of said resolution sets forth that in the opinion of said city council the best interests of said city demanded that the (then) present service be discontinued, and in so far as the proviso therein stipulated that said payment be taken without — any manner implying any actual performance of said alleged contract and that no further payments be made to said company at the present rate, said resolution (even if it was legally passed) was repealed and rescinded long prior to the commencement of this action, by an ordinance of said city, entitled "claim ordinance," duly
72 passed by the council of said city on the 7th day of July, 1896, in and by which it was ordained that the claim of the Defiance Water Company for $3160.00, the full amount charged for water and hydrant rent under said alleged contract for the first six months for the year 1896, be allowed and an order drawn on the city treasurer for the payment of $3160.00, to said water company, in payment thereof. (A true copy of which is hereto attached, filed herewith and made a part hereof marked Exhibit "F"); and by an ordinance of said city entitled "claim ordinance," duly passed by the city council of said city on the 5th day of Jan. 1897 in and by which it was ordained that the bill of said Defiance Water Company for $3160.00, the full amount claimed for water and hydrant rent under said alleged contract for the last six months of the year 1896, be allowed and an order drawn on the city treasurer for the payment of $3160.00, to said water company, in payment thereof. (A true copy of which is hereto attached, filed herewith, marked Exhibit "G" and made a part hereof); and by two ordinance- of said city entitled each "claim ordinance" duly passed by the city council of said city on the 20th day of July, A. D. 1897, and on the 3rd day of August A. D. 1897, in and by which it was ordained that the bill of the Defiance Water Company for $3160.00, the full amount claimed for water and hydrant rent under said alleged contract for the first six months of the year 1897, be allowed and an order drawn on the city treasurer for the payment of $3160.00 in payment thereof. (A true copy of which is hereto attached, filed herewith, marked Exhibit- "H" & "I" which said Exhibits "F," "G" and "H" & "I" defendants pray may be read and treated as a part of this plea.) That at the time of the commencement of this suit all of the said provisions of said resolution claimed and averred in complainant's bill to be in contravention of the Consti-

tution of the United States had thereby been repealed by the said city council and were not in force.

That if and in so far as the said resolution of January 7th, 1896 (Exhibit "A" above) has or tends to have the effect of abro-
73 gating, annulling, rescinding or repealing the said ordinance of August 17th, 1887, or the contract or any part thereof, alleged to have been evidenced thereby, it was and is a resolution of a general and permanent nature, and is such a resolution, as, and of a kind and class, which can only be passed or made of any force effect or validity by being voted on and passed by a council of a municipal corporation of Ohio, in the manner prescribed by the requirements of section 1694 of the Revised Statutes of Ohio, as amended March 31st, 1893 (90 Ohio Laws, 136) which provides:—

"By-laws, resolutions and ordinances of a general or permanent nature, shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rules, and the vote on such suspension shall be taken by yeas and nays separately on each by-law, resolution or ordinance and entered on the journal. And every such by-law resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal."

And by first being published or posted in the manner prescribed by section 1695 of the Revised Statutes of Ohio, as amended by the General Assembly of Ohio by the act of February 22", 1883, (80 Ohio Laws page 26), which provides:

"* * * Ordinances of a general nature or providing for improvements shall be published in some newspaper of general circulation in the corporation, if a daily twice, and if a weekly once before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Section 102 of the act of May 7", 1869, now section 1697, of the Revised Statutes of Ohio, which provides:

"In a corporation in which there is no newspaper published, publication of an ordinance may be made by posting up copies of it at not less than five of the most public places in the corporation, for a period of not less than fifteen days prior to the taking effect of such an ordinance." * * *

A newspaper was always published in said city of Defiance. That said resolution never was read on three different days or such reading dispensed with, and never was passed, published, or posted, and never had any force or validity as a resolution or ordinance for the purpose of annulling said contract or any part thereof, or to accomplish that result, but for that purpose or effect never became a law of said municipality.

74 That the said resolution of said city council of December 6th, 1895 (Exhibit "B" above) was and is a resolution of a general and permanent nature and is such a resolution as and of a kind and class, which by the said statute of Ohio must first be read on three different days in and by council or its reading on three different days must first be dispensed with by the vote of three-fourths of the members elected to said council before said resolution

can be voted on or passed by said council; and that by the said statute of Ohio, sec. 1694 Revised Statutes, no ordinance or resolution of a city council of such a nature or of that class or one providing for submitting the question of issuing bonds for buying or erecting water works to the voters of a municipality can be voted on or can be passed by such council unless such ordinance is first read on three different days in said council or such reading first dispensed with in the manner aforesaid; but such a resolution if voted on or attempted to be passed without three such reading- first had or dispensed with as aforesaid is utterly void and of no force whatever. That said resolution of December 6th, 1895, never was read on three different days in said city council or such reading dispensed with by said council in any manner whatsoever.

That the said city of Defiance or the city council of said city or the city solicitor of said city or any or either thereof have never claimed and do not now claim any release or immunity, from said alleged ordinance of 1887, or any part thereof or the contract or any thereof alleged to be evidenced and expressed thereby, by reason of any or either of said resolutions, proceedings or acts of said city council; and never claimed or asserted and do not now claim or assert said alleged ordinance of August 17th, 1887, or any part thereof or the said contract or any part thereof alleged to be evidenced by and incorporated in said ordinance is annulled, abrogated repealed or rescinded by any resolution or proceeding of said city council or by any or all said resolutions and proceed-
75 ings aforesaid or any other resolutions or proceedings of said city council had taken or passed since the completion on said water works.

That said city and said city council disclaim any and all reliance on or benefit from any or all said resolutions, ordinances or proceedings as releasing or tending to release said city from the obligations of said alleged contract, or as rescinding or repealing said ordinance of August 17th, 1887.

Defendants aver that said city solicitor neither in or by said suit in plaintiff's bill referred to nor elsewhere in any manner ever averred or claimed that said alleged contract between said city and said water company was illegal or invalid, or said money claimed by said water company, or any part thereof was not due or payable to said water company, by reason of said ordinance of 1887 having been repealed or rescinded or said city released from the obligations thereof by any ordinance or resolution, act or proceeding done, had or taken by said city council after said water works went into operation; nor does said solicitor, said city or said city council in said suit or elsewhere claim said resolution of December 6th, 1895, was ever passed by said city council or that said resolution ever became a law, or ever was or is of any force or effect; but aver that said resolution never was passed and never was of any force or effect.

That none of the aforesaid ordinances, resolutions or proceedings of the said city council of the city of Defiance referred to by complainant in its said bill, would or could impair the obligations of the alleged contract between complainant and said city of Defiance

and there is no probability of the courts of said State of Ohio throwing any obstacles in the way of collection by said complainant by legal process of any amount that may justly be due it from said defendant, by reason of any such resolution, ordinance or proceedings. On the contrary all the courts of the said State of Ohio have uniformly held that resolutions of a general or perma-
76 nent nature, such as said resolutions are conceded to be, cannot be passed or become laws of a municipality of said State, unless first read on three different days or such reading first dispensed with by the vote of three-fourths of the members of the council of such municipality and that such resolution cannot be of any force or effect until ten days after they are published.

All of which matters the said defendants The City of Defiance, and The Council of the City of Defiance jointly and severally as aforesaid do plead to so much of said bill as is hereinabove referred to and set forth, and insist upon their exemptions from suit in this court in this suit, and say that not this court, but the court of common pleas of Defiance county, in the State of Ohio, has jurisdiction in the premises, and pray the judgment of this court whether it shall be compelled to further answer or defend in this action; but pray the court that it may be hence dismissed without day.

GEORGE T. FARRELL,
City Solicitor of said City.
HARRIS & CAMERON,
Solicitor- for Defendant The Council of the City of Defiance.

THE STATE OF OHIO, } ss:
Defiance County, }

Charles D. Harris, Chauncey I. Morse, Daniel F. Krotz, Daniel W. Coy, John Schneider, Frank X. Groselle, James H. Shulters and Jacob Abele, the foregoing members of the city council, being first duly sworn, say the foregoing plea is not interposed for delay, and that they have read over the said plea and are familiar with the contents thereof and that the said plea is true in point of fact.

CHAS. D. HARRIS.
JOHN SCHNEIDER.
FRANK X. GROSELLE.
JACOB D. ABELE.
DANIEL F. KROTZ.
DANIEL W. COY.
CHAUNCEY I. MORSE.
JAMES H. SHULTERS.

Sworn to and subscribed before me this 27th day of February, A. D. 1899.

[SEAL.] EDWIN J. PHELPS,
Notary Public in and for Defiance County, Ohio.

77 THE STATE OF OHIO, *Defiance County,* } ss:

Charles D. Harris makes solemn oath and says that he is president of the council of The City of Defiance, defendant herein, and that the foregoing plea is not interposed for delay, and that he has read over the foregoing plea and is acquainted with the facts and allegations set forth therein and that the said plea is true in point of fact.

CHARLES D. HARRIS.

Sworn to before me and in my presence subscribed this 27th day of February, A. D. 1899.

[SEAL.]

EDWIN J. PHELPS,
Notary Public, Defiance County, Ohio.

THE STATE OF OHIO, *Defiance County,* } ss:

John A. Deindoerfer, being first duly sworn says he is the mayor of the within-named defendant, The City of Defiance, and that the foregoing plea of said city is not interposed for delay, and that he has read over the foregoing plea, and is acquainted with the contents thereof in point of fact. Witness my hand and official seal.

[SEAL.]

JOHN A. DEINDOERFER.

Sworn to before me and in my presence subscribed this 27th day of February, A. D. 1899.

[SEAL.]

EDWIN J. PHELPS,
Notary Public, Defiance County, Ohio.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

GEORGE T. FARRELL,
Solicitor for the City of Defiance.
HENRY B. HARRIS, SR.,
One of Solicitors for the Council of the City of Defiance.

78 EXHIBIT "A."

JAN. 7TH, 1896.

A resolution to draw warrant in favor of water company for $3,160.00.

Whereas, the Defiance Water Company have submitted a bill to the city council for $3160.00, alleged to be due them from the said city for water rental for the past six months:

And whereas, said council are of the opinion that no water contract exists or is between said city and said company for the payment of the same; and furthermore that said bill is in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity:

And whereas, the best interest of the city in their opinion demand that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to said city upon fair and equitable terms.

Therefore be it resolved, that the city clerk is hereby directed to forthwith draw his warrant on the city treasurer against the water fund of said city for the said sum of $3160 in favor of said Defiance Water Company in full payment of said bill; provided, however, that if said warrant be accepted by said company, it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgement of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to said company. Passed Jan. 7th, 1896.

H. D. BOKOP, *President.*

J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:

Ayes: Anderson, Bokop, Coy, Diehl, Hatry, Kingsbury, Kniss and Krotz (8).

79 EXHIBIT "B."

A resolution declaring it necessary to issue bonds for the purpose of providing means for the payment of the costs and expense of erecting or purchasing water works.

Be it resolved by the council of the city of Defiance, Ohio, that it is hereby declared necessary to issue and sell negotiable bonds of said city in the sum of ($75000) seventy-five thousand dollars to provide means for the payment of the cost and expense of erecting or purchasing for the said city of Defiance, Ohio, water-works system for the purpose of supplying said city and the inhabitants thereof with water, and that the question of issuing and selling said bonds of said city in the amount aforesaid be submitted to the electors of said city at the regular election to be held for that purpose in said city on the first Monday of April, A. D. 1896, and that the mayor of said city be and is hereby directed to give due notice of the holding of said election in the manner provided by law, and to file with the deputy State supervisors of election of Defiance county, Ohio, a copy of this resolution, duly certified by the clerk of said city.

Passed this 6th day of December, A. D. 1895.

W. KNISS,
Pres. pro Tem.

Attest:

J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:

Ayes: Anderson, Coy, Diehl, Hatry, Kingsbury, Kniss, Krotz, (7).

80

EXHIBIT "C."

A resolution.

Be it resolved, by the city council of the city of Defiance, Ohio, as follows:

That the water committee be instructed to investigate the probable costs of water works, sufficient to supply the city with clear water, and further the number of consumers of water now supplied and the approximate gross income received from the use of water, and the price, demanded for use of water at present time as compared with prices prevailing one year ago and also prices charged in other cities for similar service and to report at the earliest opportunity.

Done at the council chamber, this 12th day of March, A. D. 1897.

W. KNISS, *Pres.*

Attest:

J. J. MALLEY, *City Clerk.*

Journal D, page 18.

EXHIBIT "D."

On motion of Mr. Coy, the clerk was instructed to address a letter to the Defiance Water Company, with a view to ascertain whether or not the company would sell its plant in this city and if so what price the company would put on it.

Journal "D," page 43.

April 20th, 1897.

81

EXHIBIT "E."

The clerk read a letter from the water company declining to name a price on their plant in this city.

Journal "D," page 57. June 1st, 1897.

EXHIBIT "F."

Claim ordinance.

Be it ordained by the council of the city of Defiance, Ohio, That the following claims be allowed and paid and that the clerk be and is hereby directed to draw his warrant on the city treasurer for each claim respectively.

* * * * * * *

No. 37. The Defiance Water Co.

Water service ½ yr. to July '96. $3160.00.

* * * * * * *

Passed July 7th, 1896.

B. B. KINGSBURY,
President pro Tem.

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing claim ordinance was adopted by the following vote:
Ayes: Coy, Duerke, Hatry, Kingsbury, Krotz (5).

EXHIBIT "G."

Claim ordinance.

Be it ordained by the council of the city of Defiance, Ohio That the following claims be allowed and paid, and that the clerk be and is hereby directed to draw his warrant on the city treasurer for each claim respectively.

* * * * * * *

No. 38. Defiance Water Company.

P'm't water rent last ½ of 1896 $3160.00.

* * * * * * *

Passed Jan'y 5th, 1897.

W. KNISS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing claim ordinance was adopted by the following vote:
Ayes: Coy, Diehl, Duerke, Hatry, Kingsbury, Kniss, Krots and Shulters (8).

82 EXHIBIT "H."

Claim ordinance.

Be it ordained by the council of the city of Defiance, Ohio That the following claim- be allowed and paid and that the clerk be and is hereby directed to draw his warrant on the city treasurer for each claim respectively.

1. Defiance Water Co.

Payment on account first ½ of 1897, $768.00

* * * * * * *

Passed July 20", 1897.

The above and foregoing claim ordinance was adopted by the following vote:
Ayes: Abele, Coy, Diehl, Duerke, Harris, Kniss, Krotz, Shulters (8).

EXHIBIT "I."

Claim ordinance.

Be it ordained by the council of the city of Defiance, Ohio That the following claims be allowed and paid and that the clerk be and is hereby directed to draw his warrant on the city treasurer for each claim respectively.

1. Defiance Water Co.

Payment on account first ½ of 1897 $2392.00

* * * * * * *

Passed August 3rd, 1897.

The above and foregoing claim ordinance was adopted by the following vote:

Ayes: Abele, Coy, Diehl, Duerke, Harris, Kniss, Krotz, Shulters (8).

83 (Endorsement:) No. 1473. In the circuit court of the United States for the northern district of Ohio, W. D. The Defiance Water Company, plaintiff,—*vs.*—The City of Defiance *et al.*, defendants. Joint & several plea of defendants. Filed Feb. 25, 1899 Irvin Belford, clerk. Geo. T. Farrell, Harris & Cameron, attorneys for defendants.

84 1473. *Copy Answer. Filed Feb'y* 25, '99.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *against* THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance, Defendants. } In Equity. No. 1473.

The joint and several answer of said defendants, The City of Defiance and The City Council of the City of Defiance, Ohio, in support of said defendants' plea.

The said defendants, not waiving their said plea, but relying thereon, for this their answer in support of said plea to so much of said bill and the amendments thereto as they are advised it is necessary and material to answer unto at this time in order to properly sustain said plea this day filed to said bill and the amendments thereto aver and say, that the Defiance Water Company is a corporation organized under the laws of the State of Ohio, under said corporate name The Defiance Water Company, with its office and place of business at Defiance, Ohio; that the city of Defiance in August, 1886, was, since has been and now is a municipal corporation of the State of Ohio, a city of the fourth grade of the second class, that the city council of said city now consists of eight persons named in said complainant's said bill, and that at the commencement of this suit they and all the other parties to this action were and are now residents and citizens of said city of Defiance, in Defiance county, in the State of Ohio, and that they admit that many, if not all, the persons who have been members of the said city council of Defiance, Ohio, since January 7th, 1896, have believed, claimed and repeatedly stated that the city has no valid or legal contract with said water company; they admit that said city council on the 7th day of January, 1896, voted on the said resolution of that date referred to in complainant's bill herein and a true copy of which is

attached to and filed with said plea herein and marked Ex-
85 hibit "A" and to which reference is made; but deny, that if, and in so far as, said resolution annuls, rescinds or repeals said ordinance of August 17th, 1887, or any part thereof, or the contract or any part thereof alleged to be expressed and incorporated therein, it was ever passed by said city council; and they deny that said resolution was ever published; they admit that said city council on the 5th day of December, 1895, voted on the resolution of that date which is set forth at large as Exhibit "B" attached to and filed with the defendants' plea herein, to which exhibit reference is hereby made, but deny that said resolution was ever passed by said city council.

Defendants admit that said council had and took the other action and proceedings which are set out at large in Exhibits "C," "D," "E," "F" and "G," "H" & "I" attached to and filed with this defendant's plea herein and to which exhibits these answering defendants hereby refer; but they aver that said proceedings are all the resolutions, acts, or proceedings had or taken by said council touching said matter, and that no other, further or different proceedings were had by said council, and they aver no ordinances or resolutions looking to the construction of water works was ever passed by said council. These defendants deny that any or either of said resolutions, proceedings or acts of said council were intended to or do abrogate or repeal said ordinance of August 17th, 1887, or the contract alleged to be expressed and incorporated therein, and they deny that said city or said city council ever relied on or claimed any immunity from said ordinance of 1887, or from any part thereof, or said contract or any part thereof, by reason of any action or proceedings had or taken by said city council since the completion of said water works.

Said defendants aver, that under and by virtue of the act of the General Assembly of the State of Ohio, duly passed by said
86 General Assembly on the 31st day of March, 1893, amending sec. 1694 of the Revised Statutes of Ohio, and which provided:

"By-laws, resolutions and ordinances of a general or permanent "nature, shall be fully and distinctly read on three different days, "unless three-fourths of the members elected dispense with the rule: "and the vote on such suspension, shall be taken by yeas and nays, "separately on each by-law, resolution or ordinance, and entered "on the journal. * * * And every such by-law, resolution and "ordinance shall be adopted or passed by a separate vote of the "council and the yeas and nays shall be entered upon the jour-"nal."

Ohio Laws, vol. 90, pg. 136–137.

It was and is required that all resolutions of a general or permanent nature must be read on three different days, by the council of a municipal corporation, or their reading on three different days must be first dispensed with by the votes of three-fourths of the members elected to said council before such resolution can be voted on or passed by said council. That said resolutions of December

6th, 1895, and January 7th, 1896, (Exhibits "A" and "B") were resolutions of a general and permanent nature and were of the kind and class mentioned in said statute.

That neither said resolution of December 6th, 1895, nor that of January 7th, 1896, was ever read on three different days nor such reading dispensed with by said council, and that said resolutions are of no force or effect and were never passed; as by the uniform decisions of the supreme court of Ohio all attempts to pass such resolutions without such reading or vote dispensing therewith are of no effect, but such resolutions are absolutely void.

And further answering said defendants deny that any or all of the members of the council of the city of Defiance, at any time, ever combined, colluded or confererated together between themselves or with said city solicitor to procure him to bring suit or to procure said order of injunction mentioned in complainant's bill prohibiting them from paying said sum of money to complainant; and they deny said councilmen or any of them knew said sum or any part thereof was justly due from said city; they deny that they
87 in any manner procured themselves to be sued; and said defendants answering by and through the knowledge of the present members of said council and on information of said city solicitor and those persons who were members of said council in January, 1898, and as they believe and aver that none of the then members of said council except one Alonzo Krotz, since deceased, had any knowledge of said solicitor's said proposed action; but aver that said action of said solicitor was taken of his own volition and wholly without procurement of said council or its members; and these defendants deny each and every, all and singular the charges and allegations of knowledge, conspiracy, collusion and confederation in said bill contained.

Wherefore said defendants in support of said plea having made answer to said bill so far as they are advised it is necessary or proper for them to do at this time, pray it may be determined whether they shall be required to answer or defend herein, and that they may go hence with their costs.

THE CITY OF DEFIANCE,
By JOHN A. DEINDORFER, *Mayor.*
[SEAL.]

CHAS. D. HARRIS.
JOHN SCHNEIDER.
FRANK X. GROSELLE.
JACOB D. ABELE.
DANIEL F. KROTZ.
DANIEL W. CAY.
CHAUNCEY I. MORSE.
JAMES H. SHULTERS.
THE CITY OF DEFIANCE,
By GEORGE T. FARRELL,
Solicitor of said Defendant City.
HARRIS & CAMERON,
Solicitors for the City Council of The City Council of the *City of Defiance.*

88 (Endorsement:) No. 1473. In the circuit court of the United States for the northern district of Ohio, W. D. The Defiance Water Company plaintiff *vs.* The City of Defiance *et al.* defendant-. Answer in support of plea. Filed Feb. 25 1899 Irvin Belford, clerk. Geo. T. Farrell, Harris & Cameron, attorneys for defendants.

89 (Entered) FRIDAY, *March* 10, 1899.

THE DEFIANCE WATER CO.
vs.
THE CITY OF DEFIANCE and THE COUNCIL OF THE CITY of Defiance. } No. 1473.

To the clerk of said court:

You will please set down on the order book of the court the plea of the defendants for argument and notify the defendants' solicitors of the same.

HENRY & ROBERT NEWBEGIN,
Solicitors for Complainant.

Dated March 9, 1899.

December Term, A. D. 1898, to wit, March 25th, 1899.

Present: The Honorable Henry F. Severens, U. S. dist. judge, sitting by designation.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL OF the City of Defiance. } 1473. Equity.

This day came the parties by their solicitors and thereupon this cause came on to be heard upon the joint and several plea of the defendants to bill of complaint of complainants and the joint and several answer of said defendants in support of said plea to the bill of complaint and the same were argued by counsel. On consideration whereof the court do overrule said plea.

To the opinion of the court in so overruling said plea, said defendants jointly and severally except.

Leave is granted to said defendants to file a joint and several answer to the bill of complaint on or before May 1, 1899.

90 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

The joint and several answers of The City of Defiance and The Council of the City of Defiance, defendants, to the bill of complaint of The Defiance Water Company, complainant.

Said defendants, not waiving their demurrers heretofore filed to said bill, but relying thereon, and not waiving their pleas filed herein but relying thereon and saving and reserving to themselves the benefit, of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as they are advised it is necessary or material for them to answer unto, do aver and say:— That, the Defiance Water Company is a corporation organized under the laws of the State of Ohio, under its said corporate name The Defiance Water Company, with its office and place of business at Defiance, Ohio; that the city of Defiance in August, 1886 was, since has been and now is a municipal corporation of the State of Ohio, a city of the fourth grade of the second class, that the council of said city at the time of the commencement of this action consisted of the eight persons named in said complainant's said bill, and that at the commencement of this suit they and all the other parties to this action were and are now residents and citizens of said city of Defiance in the county of Defiance, and State of Ohio.

91 Defendants aver that the said ordinance of August 17th 1887, which is alleged to constitute the contract between the city of Defiance and the Defiance Water Company was never submitted for ratification to a vote of the electors of said city of Defiance as required by section 2434 of the Revised Statutes of Ohio, in force at that time; that the act of May 12th, 1887, (83 O. L. 146) empowered certain cities of the class to which the defendant, The City of Defiance belonged, to contract with certain persons for a supply of water for a period not exceeding twenty years only; and for that period only when ratified by the vote as aforesaid. That the city of Defiance was not one of the cities included in the provisions of said act. That said complainant or its said assigns were not of the class of persons included in said statute with whom contracts could be made. That the alleged contract was not in terms exclusive and was not intended so to be, and that the creation of an exclusive franchise or contract for the supply of water to the public is prohibited by the laws of Ohio.

And the said defendants do further aver and say, that prior to the bringing of this suit its said city solicitor in pursuance of his legal duty, under section 1777 of the Rrevised Statutes of Ohio, brought suit, as alleged in complainant's bill to restrain and perpetually enjoin the defendant council from paying, complainant any and all demands for water rents that it claimed had accrued to it against

the defendant that the complainant (defendant in said suit) attempted to remove the cause to this circuit court of the United States, on the ground that a Federal question was involved, which petition for removal was refused by the court and said cause remanded on the — day of —— 1898 that the said suit is still pending and undetermined in the circuit court of Defiance county, Ohio to
92 which court it was taken on appeal from said court of common pleas and that the present proceeding is simply an attempt to secure the privilege which has already been refused to complainant of removing the cause from the State to the Federal court.

Defendants deny that said city or said city council ever passed any ordinances or resolutions looking to the erection or construction of water works by said city for supplying it or its citizens with water. Deny that said city or its council has passed any ordinance or resolution looking toward the erection of water works. Deny that said city or its council has passed any ordinance or resolution impairing or intending to impair, or meant or intended to impair, the obligations of any contract with said complainant, or its assignors. Deny that said city or its council at the time of the commencement of this action was doing or performing any acts or proposing or intending to do or perform any acts looking toward the erection or construction of any water works in said city under or by virtue of any, all or either of the resolutions, or ordinances mentioned or referred to in complainant's bill as annulling or impairing the obligations of said alleged contract.

Defendants submit that there is no question involving the construction or effect or application of any provision of any Federal statute or of the Federal Constitution involved in this cause to warrant this court in assuming jurisdiction thereof; but submit that this court has no jurisdiction of the subject-matter of this action; and that complainant's bill ought to be dismissed; and this court should refuse to further hear or consider this cause.

Further answering these defendants admit, that said complainant was organized in part for the purpose of operating water
93 works in said city and supplying said city and its citizens with water; but said defendants believe and aver that the real and ultimate purpose of said organization was to enable the said promotors and organizers of said water company to obtain stocks and bonds of said company as they allege they did obtain them. Admit that the said city solicitor brought suit against said council and said complainant on the 4th day of January 1898, in the court of common pleas of Defiance county, Ohio; that the object, allegations and prayer of said petition in the said suit were and are substantially as set forth in said bill, that on said 4th day of January 1898, an injunction was allowed as alleged in said bill, and that the order allowing said injunction was & is as set forth in said bill; that said order of injunction was served on said complainant on the day it was allowed, and was then served on the president of said city council who in open meeting of said council notified each and all said councilmen thereof; that then and there said water company said city solicitor and said council, after the

approval thereof by the said probate judge, agreed upon the modification of said injunction as hereinafter set forth.

Said defendants, further answering upon information and belief, deny that said Bullock & Company ever were indebted to said Dennis Long & Company in the sum of $49,175.00, for water pipes for said water system at Defiance, Ohio, or in any sum whatever therefor; and deny that said Bullock & Company were indebted to said Dennis Long and Company in any sum. Deny that said Bullock & Company were indebted to said Boody, McLellan & Company and N. T. Sprague or either in the sum of one hundred thousand dollars or any sum for money used for or devoted to said Defiance water system, and they deny they were indebted to them, or either of them, therefor, or at all, in any sum. Deny that said persons or firms, or either of them ever brought any suit or ever made
94 any attachment against said Bullock & Company, or said company's property, or said water system, or any material therefor. Say that except as they are informed by said bill they are wholly unable to set forth whether said parties or firms; or either thereof had placed any claims in attorneys' hands or not; but aver if they had done so, their said action was concealed from and unknown to said city of Defiance and said city council.

Deny that any agreement or arrangement or assignment or transfer whatever was made or entered into by or between said Bullock and Company, said Long and Company Boody, McClellan and Company and N. T. Sprague, or any or either thereof, with the consent or at the request of or with the knowledge of these answering defendants or either of them, or of the council of said city.

Said defendants deny that said Dennis Long and Company, Boody, McClellan and Company, and N. T. Sprague or any or either of them took any assignment whatsoever from said Bullock and Company at the instance or request of said city, or its council or with their knowledge; and deny that said city requested them or either of them to organize said company or construct said water works; and deny that said city or its council made representations that unless said water works were completed said city would be without fire protection, or that it had provided for the abandonment of fire-engines, or other means of fire protection; and deny that said city made any promises, agreements requests or representations, through its council or otherwise, to any, all or either of said parties, and deny that said Dennis Long and Company, Boody McLellan and Company and N. T. Sprague, or said company or either relied on any promises, representations, agreements or statements of said city or its said council, but aver that if said Dennis Long and Company, Boody McClellan and Company and N. T. Sprague or any or either of them did organ-
95 ize said water company and finish and complete said water system and supply said water they did so as a part of their scheme to get the stock and bonds of said company into their hands and in order to obtain and sell for their own use and for their own profit the said three hundred and ninety-six thousand dollars par value of stock and bonds of said company which complainant

avers in its bill is issued to them, and whatever they did they did on the faith of said stock and bonds of said water company, and relying thereon and not on any requests, promises representations, statements or contracts, of said city or its council or on the income of said water works.

Admit that said council passed a resolution accepting said water works; but the defendants deny that said complainant constructed said water works according to said contract or so that they would or could furnish efficient service or good or wholesome or good and wholesome water; deny that said water works, then did or could comply with or conform to the said test referred to in said complainant's said bill, and aver that said water works have not or could not at any time since comply therewith or conform thereto as said complainant ever well knew. Defendants aver said city or its council had no power or authority to accept said water system under said alleged contract, as said complainant ever well knew and the attempt of its said council to do so was *ultra vires* and void.

Deny that said water system of said Defiance Water Company with all additions and extensions cost one hundred and ninety-six thousand dollars, or cost or was or is of the worth to exceed ninety thousand dollars.

Said defendants further answering upon information and belief charge the fact to be that said promotors and organizers of
96 said Defiance Water Company turned said plant and system over to said incorporated company at the valuation and price of two hundred thousand dollars, although the same did not cost them and was not worth or of the value of more than ninety thousand dollars; that they subscribed for and issued to themselves and to certain persons for themselves, who are unknown to these defendants capital stock of said water company to the amount of said capital stock which was issued; that there was no capital stock of said company paid for except what was paid for by turning over said water plant and system to said The Defiance Water Company. That although said promotors and organizers caused and procured said company and expenditures and expenses incurred in the construction organization and completion of said company's water works, and owned said water plant and system for just what it cost, nevertheless they caused to be issued bonds of said company and said water company's plant and system to be mortgaged for one hundred and ninety-six thousand dollars, and caused said bonds and mortgage to be delivered and turned over to said Dennis Long and Company, Boody McClellan and Company and N. T. Sprague as alleged in complainant's bill herein, without any consideration therefor to said company.

Say, that, except as set forth in complainant's bill, they have no knowledge of the income, expenses, rentals, and revenue of said water company or what interest it will pay on $200,000, or whether the revenue from said water system is less than sufficient to pay its expenses and two and one-half per cent. on $196,000.00, but these defendants believe and aver and charge the fact to be that if said water company does not yield its stock and boudholders a large in-

terest on the money they have invested therein, and even more than six per cent. on $200,000.00, it is because said business is
97 mismanaged and because said water company charges exhorbitant prices, gives inefficient service and furnishes muddy, dirty, unwholesome liquid in the place of water to its customers. Defendants admit that said water company, at the request of said city council put in thirty additional hydrants after the completion of said water system.

Defendants admit that said city has paid to said water company from time to time, down to January 1st, 1898, the full amount named in said so-called ordinance of 1887 as hydrant rental, except $500.00 demanded by said company in July 1895, but no part of which was due, payable or owing to said company for the reasons set forth in this answer and for that during the six months preceding July 1895 for more than two months said company had not in any respect complied with its said contract; or given forty pounds pressure, or furnished water fit or suitable for any purpose whatsoever. That on July —, said bill of said company was presented to said city council and by it referred to the finance committee of said council, who filed their report in writing thereon, which report is marked Exhibit "A" and made a part of this answer.

That thereafter on December 9th 1895 said company by its president its solicitor herein, and its manager, G. M. Eldridge, appeared before said council at their regular meeting and requested that the balance of their said bill, beside said $500.00 be paid without prejudice, to either party, and that the following resolution be adopted. A copy of which said resolution is hereto attached marked Exhibit "B," and made part of this answer. And thereupon said resolution was adopted as requested. That afterward said complainant in the year 1897, brought suit at law, in the court of common pleas of Defiance county, Ohio to recover said $500.00 from said city, to which the said City of Defiance answered setting up the same
98 defenses that are set up in this answer. That said suit was pending prior to the commencement of this action, and is still pending and undecided in said court; and that the same issues here involved are in issue there as to said $500.00; and these defendants submit that said action is a bar to this action touching said claim.

Admit that said city, from time to time whenever said hydrants and the water in them and in said mains were fit or suitable for use when needed by said city, has used said hydrants for fire and water purposes; but defendants aver that very often when needed and a great portion of the time said hydrants and mains were clogged with mud and dirt or frozen up, or the pressure of the water was so law that said water system was not available for fire protection or useful for that purpose. Deny that said city ever had the entire possession of control of any hydrants under said contract or otherwise.

These defendants admit that said Bullock and Company filed the written acceptance and bond referred to in plaintiff's petition, in the office of the clerk of said city; but deny that said Bullock and

Company commenced or proceeded with the work of constructing or erecting said water system aver that whatever was done about the construction of said water system was done by said complainant or the successors and assignees of said Samuel R. Bullock and Company and deny that during the construction of said water system said Bullock and Company became involved or indebted to any person for material or money used or contracted for said water system.

Defendants admit that the persons sued herein as members of the city council have individually expressed doubts as to the validity of said alleged contract whenever the same has been the
99 subject of conversation by them as they have ever had the right to do. Deny that thereby or in any way or manner they have depreciated the value of said complainant's property. They admit that said persons have held and expressed the opinion, as they ever had the right to do that said company forfeited all right to hydrant rental even if it had a valid contract after it failed to supply good water or efficient service after being notified to do so by said city.

Admit that the city council of the city of Defiance, Ohio, on the 17th day of August, 1887, voted upon the so-called ordinance in said bill referred to and set forth as Exhibit "A," attached to said bill, and believe that said Exhibit "A" is a true copy of said so-called ordinance, nevertheless defendants for their greater certainty crave leave to refer to the same when produced in this court. Admit that certain parts of certain sections of said so-called ordinance are in substance set out on pages 4, 5, and 6 of said bill. These defendants do not admit, but deny that said ordinance was ever passed by said council or that it was within the power of said council to make or pass said ordinance or any ordinance touching or relating to a water supply for said city and its citizens or either for thirty years or for any time exceeding twenty years, and any attempt to legislate for a period beyond and in excess of twenty years makes all said legislation on said subject of no effect for any length of time and void in toto. Defendants deny that said council of said city by said alleged ordinance or in any other manner made any contract or agreement whatever with said complainant or its assignors; and these defendants further aver that for the reasons in this answer set forth said council or said city had no power to make and could not and did not make any contract or agreement whatsoever touching the said matters and things, or any thereof in said bill mentioned and referred to, and the making or attempting to make said alleged contract was and is *ultra vires* and void.

100 These defendants further answering say, that, the only laws of Ohio in force at and prior to August 17th, 1887, or since granting or empowering cities of the fourth grade of the second class of said State, to which grade and class Defiance belonged in 1885, to contract for water supply were the act of the General Assembly of Ohio, passed January 29th, 1885, (82 O. L. 11) entitled "An act to amend sec. 2434 of the Revised Statutes of Ohio." And an act of the General Assembly of Ohio; passed May 12th, 1886,

(83 O. L. 146) entitled "An act to amend 'An act to authorize certain cities to contract with water companies,'" passed May 4th, 1885.

Defendants say that said so-called ordinance of August 17th, 1887, by its terms purports to grant rights to said Bullock and Company and its assigns, and to enter into a contract with said company and its assigns for thirty years, when, in fact, said city or its council if they had any power or authority, had no power or authority to grant any water right or to enter into any contract for any term exceeding twenty years, and then only when a person or company owning a water plant in said city. That said Bullock and Company or any one else did not till the year 1889 own a water plant in said city. That said so-called ordinance — purports to grant rights and enter into contracts so beyond the power and authority delegated to and invested in said city and its council and with persons they were not authorized to contract with is utterly and wholly void, for any purpose or for any time, and in law or in fact is not an ordinance and did not make or constitute any contract or agreement whatsoever with said city and is of no binding force or effect on said city or its council for any time or for any purpose. That said proposal or proposition to enter into said contract and agreement with said Bullock & Company and their assigns, contained in said so-called ordinance, never became or was and is not
101 now a contract or agreement for any purpose or for anything between said city and said Bullock and Company or said water company. That some of the chief considerations moving to said council to vote for said ordinance, *was* the length of time said contract proposed should run and that the city would have the rental of a large number of hydrants at $35.00 per — and would have a large amount of water without cost for a period of near thirty years under said proposed contract. That said alleged contract, if a contract at all, was and is one entire contract for thirty years and was and is not a contract divisible or severable in point of time, consideration or subject-matter or otherwise. That said city council would not have passed said alleged ordinance had it provided for a supply of water or for hydrant rental for a term not exceeding twenty years. Nor would said city council or said city have made or entered into a contract, in its terms and provisions the same as that proposed in said ordinance of 1887, except as to the time to run, for any period not exceeding twenty years; but for a term of twenty years or less would have required and made a different contract.

That said alleged contract or any contract touching water supply for said city was never executed and said alleged ordinance or any ordinance or resolution or proceedings touching water supply for said city never became or was binding or obligatory on said city or its council for that the same were submitted to the electors of the city of Defiance or ratified by the vote of the electors of the city of Defiance voting at any special or general election held in said city *voting at any special or general election held in said city* and were never submitted to or ratified by said electors at all; but by the

terms and provisions of the statutes of Ohio, were and are
102 null and void, and of no force; and said city and its said council were and are prohibited and barred from making or entering into any such contract or agreement with any water company without such vote of the majority of said electors first ratifying such contract as said Bullock and Company and said complainants on said 17th day of August, 1887, and ever since at all times well knew. That said city and its council or either thereof had no power to and were and are prohibited and barred from making or entering into any contract or agreement with any water company or any person or company for a water supply for such city or its citizens for any term exceeding twenty years as said Bullock and Company and said complainants on said 17th day of August, 1887 and ever since at all times well knew.

Admit that said city never elected to purchase said water system under said alleged ordinance, but aver that said city council did attempt to pass a resolution (Exhibit "C" hereinafter referred to) to submit the question of issuing bonds for and the purchasing of said water works to the electors of said city, as it was required by law to do, and that said electors voted in favor of issuing bonds and purchasing water works, and that said council were about to purchase said system under said option, but finding they had no power to issue bonds or levy taxes under said proceedings and that said resolution had not been legally passed could not do so. Thereupon, the time for said option having passed, said city sought to buy said system of said complainant, but it refused to name a price for or to sell said water system. Aver, that, after said miscarriage of said city's purpose to buy said water system and said complainant's refusal to sell, the purchase, erection or construction of water works was never under consideration by said city council or said city. That said city continued to pay water and hydrant rent semi-annually, in the amounts named in said alleged ordinance
103 of August 17th, as bills were presented by said company till they were enjoined from so doing, in the said suit brought by the said city solicitor.

Defendants aver that, neither August 17th 1887 nor prior thereto, nor any time since, was any certificate ever made filed or recorded by the city clerk as to any money in the water fund of said city and unexpended or unappropriated although sec. 2702 of the Revised Statutes of Ohio as then and ever since in force prohibited said city or said city council from passing any ordinance, resolution or order for the appropriation or expenditure of money or from entering into any contract, agreement or obligation involving the expenditure of money unless the clerk of said city shall have first make, file-, and record- a certificate that the money required for the contract, agreement and obligation and to pay the appropriation and expenditure is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose.

Defendants aver that said alleged ordinance of 1887, the contract claimed to be evidenced thereby and each and every all and singular the ordinances, resolutions, acts and proceedings — said city or its

council claimed and alleged by said complainant to constitute, evidence, ratify or confirm said alleged contract of August 17th 1887, or any contract between said city and said complainant or its assigns involved the expenditure of money or ordered appropriated and expended money, and that each and all thereof were passed, made, had and taken with- any such certificate and without any certificate ever being made or filed for record and each and all said acts, proceedings, ordinances and resolutions were prohibited by law and beyond the power of said city or its council and were all *ultra vires* and void.

104 That by the laws in force in Ohio on August 17, 1887, and ever since every city in Ohio of the 4th grade of the second class has ever been prohibited from making and had no power or authority to make or enter into any contract, incur any obligation or make any appropriation for any purpose for which taxes were levied by the city council under section 2691 of the Revised Statutes of Ohio; except for water or lighting purposes in those cities of the fourth grade of the second class in which contracts for water or lighting had been authorized by the vote of the electors of such city. That under the laws of Ohio in force on August 17th, 1887, and ever since cities of the fourth grade of the second class have had no power or authority to and have by law been prohibited from levying, certifying, collecting or receiving taxes, exclusive of levies, taxes for county, State, schools, and school-houses purposes, in excess of nine mills on each dollar of taxable property on the grand tax lists and duplicate- of such city, except for water and lighting purposes in those cities wherein the water and lighting contracts had been authorized by the vote of the electors of such city. That for many years prior to 1889 and each and every year since the necessary levies for taxation for and the necessary taxes for the current running expenses of said city of Defiance, exclusive of levies and taxes for said county, State, school-house and water purposes have exceed- nine mills on the dollar. That neither in 1887 nor any time since has said city or its council had any right power or authority to, but they ever have been by said laws expressly prohibited from making or entering into said alleged contract or any contract or incurring any debt or any obligation for water supply without having been first empowered so to do by the vote of the electors of said city. No such vote has ever been had.

105 Further answering these defendants aver, that during and for a long time prior to the month of January 1896, said complainant had not supplied the city of Defiance or its citizens with good, wholesome water fit for all or any purposes of domestic and manufacturing uses or even fit or suitable for fire purposes.

That said company had not maintained a pressure of water of forty pounds to the square inch, but had maintained and kept a much lower pressure, so low, in fact that oftentimes when said water was necessary for use in extinguishing fires a stream of water could not be thrown by means of hose and nozzle attached to said hydrants into the second story of an ordinary building; and said water supply was practically worthless for fire purposes. That the water was

frequently frozen in said fire-hydrants and said fire-hydrants and said hydrants and said water supply were often useless by reason thereof. All of which facts were well known to said complainant, but none thereof was remedied by it, although said city made frequent demands on said complainant for good, wholesome water, fit for domestic and fire purposes, and that it furnish sufficient pressure for fire purposes, and that it furnish frost-proof hydrants as aforesaid although said city duly notified said company to comply with said ordinance but said demands and notices were ever disregarded. That while said conditions were still existing, viz: shortly before the 7th day of January 1896, the said complainant presented a bill to said city council of said city of Defiance for the full amount named in said ordinance, to wit: for the sum of three thousand one hundred and sixty dollars, ($3,160) for the city's water rent and use of fire-hydrants for the last six months of the year 1895. And then, for the first time, it came to the knowledge of said city or any of its officers or councilmen that said alleged contract might be
106 illegal and void, because it had never been ratified by the vote of the electors of said city, and that said alleged contract might be illegal and void because it was an entire indivisible contract for a term of more than twenty years contrary to the provisions of the statutes of Ohio; viz: an entire contract for thirty years.

Said defendants deny that said resolution of January 7th 1896, was voted on or passed without the prior or without the subsequent knowledge of the said complainant; but aver that at said meeting of said city council on said January 7th the general manager of said company was present to procure the allowance of said water company's said bill, and he then and there urged the allowance of said bill, plead the pressing needs of said company, promised it would furnish good water, sufficient pressure and efficient service in future, and stated that the said city should not waive any of its rights or incur any additional obligations to said company by making such payments, and proposed that the same arrangement be made that had been made by the city and company on December 9th, 1895, touching the $500.00 (Exhibit "B" above) Thereupon, to evidence that understanding and to make the payments subject thereto, and to give said company the formal notice prescribed by said section 14 of said alleged ordinance of August 17th, said resolution was drafted with the knowledge and approval of said company's said manager, said G. M. Eldridge. Said resolution being entitled "*A resolution to draw warrant in favor of water company for $3160.00*" (a true copy of which resolution together with all the proceedings of said council touching the same is attached to and filed with this answer, and marked Exhibit "D," and which defendants pray may be read and treated as part of this answer.)

Thereupon said city council, desiring and intending not to waive any rights of the city by the unconditional payment of money
107 under said alleged contract after the city had knowledge of the invalidity thereof, but for the purpose of protecting and securing the rights of said city and its citizens to challenge the

validity of said alleged contract in the future, if it should be necessary so to do, and desiring and intending to again notify said company, that it was not complying with the requirements of said ordinance, and that the former inefficient service must be discontinued and a sufficient water supply furnished and that if the same service continued no further payments would be made to said company as prescribed by section 14 of said ordinance of August 17th 1887, which provides: "Any neglect or refusal on the part of Samuel R. Bullock & Company, their associates, successors or assigns, after due notice shall have been given them to comply with all the requirements of said ordinance, shall cause a forfeiture of the hydrant rental until each and all of the said requirements herein provided for are complied with" voted in favor of said resolution. That said city or said city council did not by said resolution appeal, annul, abrogate, or impair, or intend to repeal, annul, abrogate or impair the said alleged ordinance of 1887, or any part thereof, or the contract or any part thereof alleged to have been made thereby, that neither said complainant nor said defendants understood considered or treated said resolution as a repeal, impairment or abrogation of said alleged contract up to the time complainant filed its bill in this suit, but on the contrary pursuant to the terms of said resolution the said claim of said water company for thirty-one hundred and sixty dollars was placed on the claim ordinance of said city and said claim ordinance was duly passed by said council on said 7th day of January 1896, and said bill thereby ordered paid (which said ordinance is hereto attached marked Exhibit "E" and defendants pray it may be read and treated as part of this answer), and the same was paid to
108 said complainant, as were all bills presented by said water company to said council, for the semi-annual installments of water and hydrant rent up to the time a bill was presented by said company in January 1898, for water and hydrant rental for the last half of the year 1897, in all four installments being paid by said city after the 7th day of January, 1896. That before the said complainant's bill for the amount of the last half of water rent for the year 1897, was presented to said city council the said council had been restrained from allowing or paying said bill by the injunction granted in said suit brought by the said city solicitor mentioned in complainant's bill herein.

Defendants aver that said attempted enactment of January 7th 1896 was and is not an ordinance but merely a resolution. That no ordinance or ordinances relative to the water supply of said city or to said alleged contract have been considered or passed by said council since March 1889, except those providing for paying water company's bills and one for protecting the water supply of said city.

That beside said resolutions of January 7th, 1896, and December 5th, 1895, and certain requests and resolutions as to the extension of water mains and location of hydrants, and numerous objections and notices as to the water-supply pressure and service as hereinafter referred to, the only other resolution passed or considered or proceedings had or taken in or by said city council relating to said water

supply or with reference to or touching said water company or its relation to said city, were the following, viz:

(1.) A so-called resolution entitled "*A resolution declaring it necessary to issue bonds for the purpose of providing means for payment of the cost and expense of erecting or purchasing water works,*" (a true copy of which, together with all the proceedings of the council
109 touching the attempted passage thereof is hereunto attached, marked Exhibit "F," and which defendants pray may be read and treated as a part of this answer.) Said resolution was introduced and voted on in said city council on December 6th 1895 but defendants aver it was never read on three different days or the reading thereof dispensed with, and was never passed, and never became a law or of any force or effect whatsoever.

(2.) A resolution passed by said city council on the 12th day of March 1897, directing the water company to report as to cost and income of water plant and changes made by the Defiance Water Company (a true copy of which is attached to and filed with this answer and marked Exhibit "G" and which defendants pray may be read and treated as a part of this answer.)

(3.) An order passed by the said city council on the 20th day of April, 1897 directing the city clerk to communicate with The Defiance Water Company, complainant herein, and ascertain if said company would sell its water system to this city and if so at what price; and said city clerk's report to said city council made on the 1st day of June 1897, (a true copy of which order is hereto attached, and filed herewith marked Exhibit "H" and a copy of which report is hereto attached, filed herewith, marked Exhibit "I," which exhibits defendants pray may be read and treated as a part of this answer).

That any or all of said proceedings of said council did not impair or tend to impair the obligations of said alleged contract; but were had and taken by said city council in the due exercise of its legislative duties while endeavoring to subserve the interests of said city.

Said defendant denies that said city council by said resolution of January 7th, 1896 or by any ordinance, resolution or pro-
110 ceeding whatever "in substance" or "in effect" rescinded, annulled or abrogated said alleged contract with said water company "so far as it had power so to do," or at all; deny that said resolution, voted on as it was, or any proceedings of said council were or could be subject to the constitutional inhibitions urged and set forth in said bill, and none or all thereof contravene all or any of the constitutional provisions referred to in complainant's bill.

That said resolution of December 6th 1895, (Exhibit "C" above) and said resolution of January 7th 1896 (Exhibit "D" above) in so far as they have the effect of or tend to abrogate, annul, rescind or repeal the said ordinance of August 17th 1887, or the contract or any part thereof, alleged to have been evidenced thereby (which tendency or effect these defendants deny) they were and are resolutions of a general and permanent nature and such as and of a kind and class, which can only be passed or made of any force, effect, or validity by being voted on and passed by a municipal corporation after having been first read therein on three different days,

or such reading dispensed with by the yea-and-nay vote of three-fourths of the members elected to such council; and by first being published in a newspaper of general circulation in the corporation, if a daily twice, if a weekly once, for ten days, if such paper is published in the corporation. A weekly and daily newspaper of general circulation has always been published in Defiance since it became a city. Neither of said resolutions was read on three different days nor such reading dispensed with by said council, nor ever was passed by said council, or published in any newspaper, nor ever had any force or validity as a resolution or an ordinance for the purpose or with the effect of annulling or impairing said alleged con-
111 tract or any part thereof; but for that purpose or effect never became a law of said municipality. That said resolution of December 6th was illegal and void because it submitted the question of issuing bonds, purchasing or erecting water works together.

That in so far as the preamble of said resolution of January 7th set forth that in the opinion of said city council the best interests of said city demands that the present service be discontinued, and in so far as it was thereby resolved that no further payments be made to said company at the present rate, said resolution (even if it was legally passed) was repealed long prior to the commencement of this action by each and all of the ordinances of said city each entitled "claim ordinance" respectively passed by said city council on the — day of July 1896, on the 5th day of January 1897, on the 3rd day of August 1897, (copies of which ordinances are hereto attached, marked Exhibits "J" "K" and "L" and which defendants pray may be read and treated as a part of this answer) and by which payments were made for two years after said January 7th. That at the time of the commencement of this suit, all of the said provisions of said resolution claimed and averred in complainant's bill herein to be in contravention of the Constitution of the United States had thereby been repealed by the said city council and were not in force. That the said city of Defiance or the council of said city or the city solicitor, or any of them have never claimed and do not now claim any release or immunity from said alleged ordinance of 1887, or any part thereof, or the contract or any part thereof, alleged to be evidenced and expressed thereby by reason of any or either of said resolutions, proceedings or acts of said city council complained of in com-
112 plainant's bill, further than whatever effect they may have as notices to said company of its failure to supply good water or efficient service. That these defendants or either of them never claimed or asserted and do not now claim or assert said alleged ordinance of August 17th, or any part thereof or said contract or any part thereof alleged to be evidenced thereby was or is annulled, impaired, abrogated, repealed, or rescinded by any resolution or proceedings of said city council or by any or all said resolutions and proceedings aforesaid further than said resolutions or any of them are notices as aforesaid. Said defendants disclaim any and all reliance on or benefit from any or all said resolutions or proceedings as releasing or tending to release said city from the obligations of said alleged contract other than by reason of the notice therein con-

tained; but said city and its solicitor have ever claimed that said alleged contract was void and illegal in its inception, and neither they or said council have ever claimed it was annulled, impaired, abrogated, or repealed by any subsequent action of said city council, any further than such action served as notice as aforesaid, and as such affects the rights of said parties under said alleged contract.

That none of the aforesaid ordinances, resolutions, or proceedings of the said city council of the city of Defiance referred to in complainant's said bill, did, would or could impair the obligations of the alleged contract between complainant and said city of Defiance and there is no probability of the courts of the said State of Ohio throwing any obstacles in the way of the collection by said complainant by legal process of any amount that may justly be due it from said defendants, by reason of any such resolution, ordinance or proceedings. On the contrary all the courts of the said State
113 of Ohio have uniformly held that resolutions of a general or permanent nature, such as said resolutions are conceded to be, cannot be voted on, passed or become laws of a municipality of said State, unless first read on three different days or such reading first dispensed with by the vote of three-fourths of the members of said council of such municipality; and that such resolutions cannot be of any force or effect until ten days after they are published.

That neither the interlocutory order of said probate judge acting therein as a common pleas judge in said suit brought by said city solicitor in said court, nor the bringing and prosecution in said court of said action based on the sole ground as said suit was, that said alleged contract of August 17th 1887 was prohibited by law and void in its inception is, nor would the recovery of a final judgment therein be within the constitutional inhibitions of section 10 of article 1 of the Constitution of the United States or any other constitutional provisions; as the said action of said probate judge, the bringing and prosecution of said suit by said city solicitor and a final judgment and decree in such an action so brought and prosecuted in a court of equity had been expressly authorized and provided for by the statutes of Ohio in force at and prior to the alleged contract set forth in said complainant's bill.

Admit that said city paid said company seven hundred and fifty-six dollars after the allowance of said restraining order by said probate judge in said suit of said city solicitor against said city, but aver that at the request of said water company after notice to said city solicitor and on agreement between said solicitor said council and said company, said judge, who allowed said injunction directed that the same be modified so as to allow the payment of said $756.00 for certain pressing need of said water company, and said
114 $756.00 was paid under said arrangement and modification of said order and not otherwise; but said city council would not and did not allow said payment until after said city solicitor and said water company together procured from said judge, his consent to said modification.

Defendants deny that said complainant, by said city solicitor's suit or otherwise, will be deprived of its property without due pro-

cess of law, or that its property will be confiscated or converted to defendants' use or that it will be deprived of a right to trial by jury. Defendants aver that said complainant was not entitled to a trial by jury in an equity or an injunction case, and hence could not be deprived of such right.

These defendants further admit that said city of Defiance has a fund in its treasury and under its control and dominion known as the water fund and that there are moneys in said fund but deny it is there for the payment of said $3142.50 mentioned in complainant's bill or any part thereof or for any sum complainant claims will hereafter become due it.

Deny that the complainant on January 18th requested the city council to aid the water company to defend said suit brought by said city solicitor or that it is true and defendants deny said city council refused to defend said suit, but aver that the solicitor for said complainant asked said city council who it was going to employ as its attorney in said case. Defendants aver said city council employed as their council of the city Messrs. Harris & Cameron, responsible attorneys and solicitors of the courts of Ohio, and of the circuit and of the supreme courts of the United States, and laid all the facts touching said transactions and dealing between said city and said water company, and the claims of said water company and of said city solicitor before their said attorneys and made full disclosures to them of the whole matter to the extent of their
115 knowledge and information, and directed their said counsel to take such action and proceedings in the premises as the law and the facts warranted and as would best subserve the interest of council and said city.

Said defendants deny that any water-consumers have been induced to abandon the use of water theretofore furnished by said company by reason of any statement or denials public or general or otherwise *or* said city council or its members or by any ordinances or resolutions passed or proceedings taken by said council; but defendants aver if any customers have discontinued the use of water or any would-be customers have been deterred from becoming such customer- of said complainant they have been induced to discontinue or been deterred from use by the exhorbitant charges made by said company for water or by the fact that the water furnished is not fit or suitable for domestic or manufacturing use more than one-half of the time by reason of the mud, and dirt which is in said water much of the time, and by reason of the fact that much of the time the pressure is insufficient.

Defendants aver that, since said water works were completed, said complainant has never for any considerable length of time furnished good or wholesome water or made charges which did not exceed the schedule rate prescribed by section 13 of Exhibit "A" attached to complainant's bill, or in any respect complied with any of the provisions of said alleged ordinance and although on February 17th, 1891, February 5th 1894, July 2nd 1895, November 7th, 1895, December 9th 1895 January 7th 1896, December 31st 1896, September 21 1897, January 1st, 1898, and many other times prior to the com-

mencement of this action said city notified said complainant it was not complying with said alleged ordinance and that it should furnish the city and its citizens good and wholesome water sufficient pressure and frost-proof hydrants and keep mains and pipes clear of mud so that said water might be good and wholesome, and fit for fire protection, and since the commencement of this action, viz: on the — day of —— 1899, likewise notified said company by delivering a written notice to each its president, secretary and general manager (a true copy of which notice is hereto attached marked Exhibit "M" and which defendants pray may be read and treated as part of this answer) but said complainant has ever neglected and refused to comply with all or any of the requirements of said ordinance.

116

Said defendants further answering aver that said Samuel R. Bullock and Company, Boody McClellan and Company, N. T. Sprague and complainant on and prior to the said 17th day of August 1887, and ever since had knowledge and notice and were chargeable with knowledge and notice, that, said city of Defiance or its council had not passed any ordinance or resolution and had no power or authority to pass an ordinance or resolution to make or enter into said alleged contract or such a contract or to confirm or ratify the same, or, by any action, statement or promise, estop the city or its council from disputing the validity of such alleged contract, and that any such acts or proceedings of said city or its said council were and are *ultra vires* prohibited by the law of Ohio and void.

Said defendants further answering deny that said complainant has not charged and does not charge the citizens or residents of Defiance for water in excess of the prices prescribed in and by the so-called ordinance of 1887, but on the contrary said defendants aver that said company has ever charged and does now charge each and every consumer far in excess of said schedule of prices contained in section 13 of said ordinance of August 17th, 1887.

117

Defendants deny that said company has fully complied with all or any of the conditions of said alleged ordinance of August 17th 1887, or that it has furnished water for public or private purposes as agreed continually or at all; but on the contrary said company has never furnished and does not now furnish good and wholesome water or good or wholesome water or water fit or suitable for all or any domestic use or fit or suitable for manufacturing uses, and does not supply or furnish water fit or suitable for fire purposes and the water furnished by said company has always been and is much of the time bad, unwholesome, muddy, foul, and dirty so that by reason thereof said water has been and is unfit for cooking, drinking, bathing, or for any domestic purposes and has been much of the time so full of dirt and mud that it has been wholly useless for fire purposes. The hydrants have been frozen up and clogged and stopped with mud and pressure has been too low to make said water of any use for fires much of the time, and by reason thereof many disastrous fires have occurred.

And further answering said defendants deny that any or all of the members of the council of the city of Defiance, at any time, ever

combined, colluded or confederated together or between themselves or with said city solicitor to procure him to bring suit or to procure said order of injunction mentioned in complainant's bill prohibiting them from paying said sum of money to complainant; and they deny that said councilmen or any of them knew said sum or any part thereof was justly due from said city to said complainant; and they deny that they in any manner procured themselved to be sued, and said defendants answering by and through the knowledge of the present members of said council and on information of said city solicitor and those persons who were members of said council in January 1898, and as they believe and aver and say that
118 none of the then members of said council except one Alonzo Krotz had any knowledge of said solicitor's proposed action, but aver that said action of said solicitor was taken on his own volition and wholly without procurement of said council or its members. And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoid-, or denied, is true to the knowledge or belief of these defendants, and each of them; all of which matters and things these defendants and each of them is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays that complainant's bill may be dismissed and these defendants go hence without day.

GEORGE T. FARRELL,
Solicitor for the City of Defiance, Ohio.
HARRIS & CAMERON,
Solicitors of the City Council of the City of Defiance.

119 EXHIBIT "A."

Report of the Finance Committee in the Matter of Water Service.

Mr. President:

The finance committee, in reducing the bill of the Defiance Water Company for water rents for the first half of the year 1895, make the following statement in justification of the act.

1st. Low pressure at the plow-works fire.

2nd. At the Kreiderwise fire the fire-plugs were frozen solid and were useless.

3rd. At the McMillen fire the pressure was so low that the department was helpless.

4th. At the Kittner fire the same state of facts occurred.

5th. At the Shultz, Williams and Mangas fire the plugs were full of mud and the pressure too low to be of use until the fire had gained great headway.

6th. The pressure as indicated by the dials for two weeks preceeding the 24th was below forty pounds.

For the first four items we deduct..... $241.21
For the fifth item we deduct..... 258.79

Total deduction..... $500.00

DIEHL,
KROTZ,
HATRY,
Finance Committee.

120 EXHIBIT "B."

A resolution.

Be it resolved by the city council of the city of Defiance O. as follows:

That J. J. Malley, the city clerk, be and he hereby is directed to deliver to the Defiance Water Company a warrant for the sum of $2607.50 allowed in claim ordinance passed July 3rd 1895, the delivery of said warrant not to be held or deemed to be an admission of any liability on the part of the city of Defiance to pay any other or further sum for water rent of hydrants for the term of six months ending July 1st, 1895. And the receipt of which shall not be held to be a waiver of payment of $500.00 claimed to be due in addition to the said $2607.50 to said The Defiance Water Company for said rent.

Done at the council chamber this 9th day of Dec. A. D. 1895.

W. KNISS,
Pres. pro Tem.

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:

Ayes, Anderson, Coy, Diehl, Hatry, Kingsbury, Kniss,—6.

121 EXHIBIT "C."

A resolution declaring it necessary to issue bonds for the purpose of providing means for the payment of the costs and expense of erecting or purchasing water works.

Be it resolved by the council of the city of Defiance, Ohio, That it is hereby declared necessary to issue and sell negotiable bonds of said city in the sum of ($75000.) seventy-five thousand dollars to provide means for the payments of costs and expense of erecting or purchasing for the said city of Defiance, Ohio, water-works system for the purpose of supplying said city and the inhabitants thereof with water, and that the question of issuing and selling said bonds of said city in the amount aforesaid be submitted to the electors of said city at the regular election to be held for that purpose in said city on the first Monday of April A. D. 1896 and that the mayor of said city be and he hereby is directed to give due notice of the holding of said election in the manner provided by law, and

to file with the deputy State supervisors of election of Defiance county, Ohio a copy of this resolution duly certified by the clerk of said city.

Passed this 6th day of December A. D. 1895.

W. KNISS,
Pres. pro Tem.

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:

Ayes: Anderson Coy, Diehl, Hatry, Kingsbury, Krotz,—7.

122 EXHIBIT "D."

A resolution to draw warrant in favor of the water company for $3,160.00.

Whereas. The Defiance Water — have submitted a bill to the city council for $3160 alleged to be due them from the said city for water rental for the past six months:

And whereas: said council are of the opinion that no water contracts exists or is between said city and said company for the payment of the same and furthermore that said bill is in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity:

And whereas: the best interest of the — in their opinion demand that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to said city upon fair and equitable terms, therefore:

Be it resolved that the city clerk is hereby directed to forthwith draw his warrant of the city treasurer against the water fund of said city for the sum of $3160.00 in favor of said Defiance Water Company in full payment of said bill, provided however, that if said warrant be accepted by said company it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgement of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to said company.

H. D. BOKOP, *President.*

Passed Jan. 7th 1896.

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote; Ayes: Anderson, Bokop, Coy, Diehl, Hatry, Kingsbury, Kniss, Krotz—8.

123 EXHIBIT "E."

Claim ordinance.

Be it ordained by the council of the city of Defiance, O. That the following claims be allowed and paid and that the clerk be and he

hereby is directed to draw his warrant on the city treasurer for each claim respectively:

37. Defiance Water Co.

Water service ½ yr. to July '96 $3160.00

Passed July 7th 1896.

B. B. KINGSBURY,
President pro Tem.

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing ordinance was adopted by the following vote: Ayes: Coy, Duerk, Hatry, Kingsbury, Krotz—5.

EXHIBIT "F."

A resolution.

Be it resolved by the city council of the city of Defiance, Ohio, as follows:

That the water committee be instructed to investigate the probable costs of water works, sufficient to supply the city with clear water, and further the number of consumers of water now supplied and the approximate gross income received from the use of water, and the price, demands for use of water at the present time as compared with prices prevailing one year ago, and also, prices charged in other cities for similar service and to report at the earliest opportunity.

Done at the council chamber, this 12th day of March A. D. 1897.

W. KNISS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:—Ayes. Coy, Diehl, Duerk, Hatry, Kingsbury, Kniss, Shulters,—7.

124 EXHIBIT "G."

On motion of Mr. Coy, the clerk was instructed to address a letter to the Defiance Water Company, with a view to ascertain whether or not the company would sell its plant in this city and if so what price the company would put on it.

Journal "D," page 43. April 20th, 1897.

EXHIBIT "H."

The clerk read a letter from the water company declining to name a price on their plant in this city.

Journal "D," page 57. July 1st, 1897.

EXHIBIT "I."

Claim ordinance.

Be it ordained by the city council of the city of Defiance, Ohio, That the following claims be allowed and paid, and that the clerk be and is hereby directed to draw his warrant on the city treasurer for each claim respectively.

No. 38. Defiance Water Company.

Pa't water rent last ½ 1896 $3160.00

Passed Jan'y 5th, 1897.

W. KNISS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing claim ordinance was adopted by the following vote:

Ayes: Coy, Diehl, Duerk, Kingsbury, Kniss, Krotz, Shulters,—8.

125

EXHIBIT "J."

Claim ordinance.

Be it ordained by the council of the city of Defiance, Ohio, That the following claims be allowed and paid and that the clerk be and is hereby directed to draw his warrant on the city treasurer for each claim respectively.

1. Defiance Water Co.

Payment on account first ½ of 1897 $768.00

This ordinance shall take effect and be in force from and after its —.

Passed July 20th 1897.

W. KNISS, *President.*

J. J. MALLEY, *City Clerk.*

The above and foregoing claim ordinance was adopted by the following vote.

Ayes: Abele, Coy, Diehl, Duerk, Harris, Krotz, Shulters,—8.

EXHIBIT "K."

Claim ordinance.

Be it ordained by the council of the city of Defiance, Ohio, That the following claims be allowed and paid and that the clerk be and is hereby directed to draw his warrant of the city treasurer for each claim respectively.

1. Defiance Water Co.

Payment on account first ½ of 1897, $2392.00

This ordinance shall take effect and be in force from and after its passage.

Passed: August 3rd, 1897.

The above and foregoing ordinance was adopted by the following vote:

Ayes: Abele, Coy, Diehl, Duerk, Harris, Kniss, Krotz, Shulters,—8.

126 EXHIBIT "L."

On motion of Mr. Schneider the water committee of said council was instructed to serve the following notice on the Defiance Water Company, by the following vote:

Ayes: Coy, Grosselle, Harris, Morse, Schneider, Shulters,—6.

DEFIANCE, OHIO, *Feb. 28th*, 1899.

To the Defiance Water Company, Defiance, Ohio:

If it shall be finally determined in the causes now pending in the State and United States courts, or in either thereof, or in any other case in any court of final jurisdiction that the Defiance Water Company has a valid contract with the city of Defiance for hydrant rental with said city and for supplying said city and its inhabitants with water under and by virtue of the terms and provisions of the alleged ordinance of August 17th 1887, water rentals would be due and payable by said city not otherwise than under and subject to the terms and conditions of said ordinance which prescribes, among other things, that after the said water works are put into operation, if at any time, the pressure *guages* shall indicate a pressure of less than forty pounds on the distributing mains for the period of two weeks in succession, then the rental for the use and employment of the hydrants for the purposes aforesaid shall cease until the pressure in this section provided for shall be attained; certain maximum rates as set forth in section 13 of said ordinance are prescribed which may be charged for water, that the water shall be taken from such point as shall be free from all sewerage contamination; and shall be taken from a crib or well, and shall be at all times good wholesome water, fit for all purposes of domestic and manufacturing uses; and that said company shall furnish double-nozzled frost-proof fire-hydrants.

127 Although you have been heretofore repeatedly notified you are again hereby notified, that the said water company has not complied with and is not complying with any or either of said provisions, and by the terms of said section 14 of said ordinance it is provided that any neglect or refusal on your part to comply with all the requirements of said ordinance after notice given you shall cause a forfeiture of the hydrant rental until each and all of the said requirements provided for are complied with. And you are hereby notified that, if it be determined a valid contract exists between said

city and said water company, you are not and will not be entitled to any hydrant rental under the terms of said ordinance and the notices heretofore given you and under this notice unless all the terms and provisions of said contract shall have been complied with, and which provisions have not been and are not now being complied with by you.

(Endorsement:) No. 1473. In the circuit court of the U. S. N. D. of Ohio, W. D. The Defiance Water Company *vs.* The City of Defiance and Council of the City of Defiance, defendant-. Answer. Filed May 1, 1899, Irvin Belford, clerk. George T. Farrell and Harris & Cameron, attorneys for —.

128 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

The complainant, by its solicitors, moves the court to order stricken from the files the answer of the defendants filed herein on the 1st day of May, 1899, for that it has been irregularly filed and without leave of the court.

HENRY & ROBERT NEWBEGIN,
Solicitors for the Complainant.

(Endorsement:) No. 1473. In equity. The Defiance Water Company *vs.* The City of Defiance and the Council of the City of Defiance. Motion to strike answer from the files. Filed. May 11, 1899 Irvin Belford, clerk. Henry and Robert Newbegin, compl't's solicitors.

129 December Term, A. D. 1898, to wit, May 11th, 1899.

Present: Honorable Augustus J. Ricks, U. S. district judge.

THE DEFIANCE WATER CO.
vs.
THE CITY OF DEFIANCE ET AL. } 1473. In Equity.

It is hereby ordered that this case, No. 1473, be and the same is continued to the next term of this court.

130 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

The complainant by its solicitor, moves the court to order to be taken and stricken from the files the answer of the defendants, filed

herein May 1st, 1899; for that said defendants have pleaded and set out in said answer the substance of the whole of their plea, so-called, herein filed, and heretofore overruled by order of the court after hearing of argument thereof, or that so much of said answer as contains what in substance was embodied in said plea (which is too voluminous and verbose to be herein set out) be ordered stricken out of said answer.

HENRY AND ROBERT NEWBEGIN,
Solicitors for Complainant.

(Endorsement:) No. 1473. Circuit ct. of U. S. N. D. O. west'n div. The Defiance Water Company *vs.* The City of Defiance and City Council of Defiance. Motion to strike answer from files. Filed Aug. 22, 1899 Irvin Belford, clerk. H. & R. Newbegin, for complainant.

131 June Term, A. D. 1899, to wit, November 28, 1899.

Present: The Honorable Augustus J. Ricks, dist. judge.

THE DEFIANCE WATER CO.
vs.
THE CITY OF DEFIANCE ET AL. } No. 1473. Equity.

It is hereby ordered that this case No. 1473, be and the same is continued to the next term of this court.

132 December Term, A. D. 1899, to wit, December 11, 1899.

Present: The Honorable Horace H. Lurton, circuit judge. Honorable Charles D. Clark, district judge, sitting by designation. Honorable Henry F. Severens, district judge, sitting by designation. Honorable Augustus J. Ricks, district judge.

DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

This day this cause came on for hearing before the Hon. Henry F. Severens, sitting by designation, and thereupon it is ordered by the court that the complainant has until rule day in January, 1900, in which to set this cause down for hearing upon the bill and amendment to the bill and the answer thereto; or to file replication to the answer as counsel may be advised.

133 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

The replication of The Defiance Water Company, complainant, to the joint and several answers of the defendants, The City of Defiance and The Council of the City of Defiance.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answers of the said defendants, for replication thereunto says that it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive and insufficient in law to be replied unto by this repliant, without that, that any other matter or thing in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

HENRY & ROBERT NEWBEGIN,
Solicitors for Complainant.

134 (Endorsement:) No. 1473. In the cir. ct. of the U. S. N. D. O. W. D. The Defiance Water Company again-t The City of Defiance *et al.* Replication. Filed Dec. 30, 1899, Irvin Belford, clerk. Henry and Robert Newbegin, Defiance, Ohio, attorneys for repliant.

135 1473. Filed Jan. 9, 1900.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
against
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity. Motion.

Now comes the defendant The City of Defiance and comes also the defendant, The Council of the City of Defiance, and severally move this honorable court for an order staying further proceedings in this court in this suit, and postponing and deferring the taking of evidence in this cause and the final hearing hereof until after the final hearing and determination in the State courts of Ohio of the case of The City of Defiance against The Council of the City of De-

fiance and The Defiance Water Company, now pending in the circuit court of Defiance county, in the State of Ohio.

And these defendants as the ground of and reasons for said order represent and show to this honorable court that on the 24th day of June, 1898, the Defiance Water Company filed in this court in this cause its bill herein against the said City of Defiance, and said The Council of said City of Defiance, and set forth therein, in substance, that said plaintiff is an Ohio corporation and said defendant city is a municipal corporation of Ohio, and said city council is the city council of said city; that said plaintiff was organized for the purpose of operating water works in the city of Defiance for supplying water to its citizens and to said city. That on the 4th day of June, 1898, The City of Defiance by its city solicitor as plaintiff, brought suit against The Council of said City of Defiance, and said Defiance Water Company, plaintiff herein, in the court of common pleas of Defiance county, Ohio, and that the object of said suit and the prayer thereof was to restrain and enjoin the council of said city from executing or performing a certain contract claimed to have
136 been entered into by and between said city, as assignors of said water company and said water company and from said city any and all claims for water rent claimed to be due from said city to said water company under said contract, for that, the said contract was illegal, void and prohibited by the statutes of Ohio, and that any payment thereunder was a misapplication of the funds of said city: that the probate judge of said Defiance county issued an injunction in said cause restraining said city council from paying said water company any money under said contract or performing said contract. Plaintiff further set out said contract and a statement of the amount claimed from said city and averred said city had passed certain ordinances which impaired the obligations of said contract.

Said water company in its said bill prayed that an account be taken of the amount due it from said city of Defiance under its said contract and as well for any money that may accrue and become payable during the pendency of said suit and that the said city and city council may be decreed and ordered to allow and pay the same, and that the said city and its council may be enjoined from denying the existence or legality of said alleged contract or from attempting to abrogate or annul the same, and for all other, further and equitable relief which the nature of the case may require and to the court seem just and equitable.

Said defendants further represent and show that in truth and in fact said city had filed in said court of common pleas said petition as aforesaid against said city council and said water company and caused summons to be issued thereon and personal service of such summons to be made on said defendant and had thereby commenced said action and acquired jurisdiction of the subject-matter thereof and of the parties thereto.

That in due time the said water company filed in said court of common pleas its petition and bond in due form of law for the removal of said cause to this court and caused, in due time, a properly

certified transcript of the record of said cause in the court of
137 common pleas to be filed in this court. That thereafter the said city of Defiance, by its solicitor, and said council of the city of Defiance moved this court to remand said cause to the court of common pleas for the reason that this court had no jurisdiction thereof That said Defiance Water Company applied to this honorable court for leave to file its cross-bill in said cause in this court and submitted and offered as its said cross-bill therein the bill now on file in this cause in this court. That said motion for leave to file said cross-bill in said cause was overruled. That said motion to remand said cause to the court of common pleas of Defiance county, Ohio, was granted and said cause remanded.

That thereafter the said The Defiance Water Company filed its demurrer in said court of common pleas to the said petition of said plaintiff setting forth, as its ground of demurrer, and there was a misjoinder of the parties defendant in said action, that said water company was an improper and unnecessary party and that the petition of the said plaintiff did not contain facts sufficient to constitute a cause of action in favor of said plaintiff and against said water company.

That thereafter said cause was submitted to said court of common pleas on said petition and demurrers and said first and second grounds of demurrer were overruled and said third ground of demurrer was by said court sustained and said cause was dismissed, from which said order and decision said plaintiff then and there appealed to the circuit court of said Defiance county in said State of Ohio, and duly perfected its appeal; and thereafter on the 27″ day of October, 1899, said cause came on for hearing in said circuit court on said demurrers of said defendant water company to said petition of said plaintiff and were submitted to said circuit court; and said circuit court thereupon found and determined that said demurrers, or any or either of them, were not well taken and overruled the same said defendant water company, on its motion, had leave to answer the petition of the said plaintiff in said court, and said cause is still
pending in said circuit court and will be for hearing
138 and determination in said court at the March term of said court, or as soon thereafter as will be possible for the said cause to be submitted to said court, on the said petition of the said plaintiff, The City of Defiance and on any answer and cross-petition which the said Defiance Water Company may file therein, and said water company will have the right and privilege to and may make and set forth in and by its answer and cross-petition in said cause any defenses it may have to said claim and if entitled thereto may have the affirmative relief against the said city of Defiance and the council of the city of Defiance touching the contract and payment of money claimed by it and every other equitable relief which it has prayed for or may pray for or obtain in this court in this cause.

That upon said suit of the city of Defiance against said water company and said council of the city of Defiance being remanded

as aforesaid to said court of common pleas of Defiance county, Ohio, the said The Defiance Water Company filed its said cross-bill as its bill in this suit in this court as aforesaid.

That the moneys for which an account is prayed for in and by said bill and which it is prayed that the court will order the said city and its council to pay said water company are the same moneys and no other or different than those which said city, by its solicitor in and by said suit in the State court, seeks to enjoin the said city council from paying to said water company. That the said contract which said water company seeks in and by this action to have enforced which it seeks to have said defendants enjoined from denying, abrogating, or attempting to refuse or refusing to perform is identically the same contract and no other or different contract from that which the said city of Defiance by said city solicitor in said State court in said action seeks to have set aside, declared null, illegal and void. That the parties in said action in said State court are identically the same and no other or different parties than those in this suit in this court. That the subject-matter of said suits are identically the same and no subject-matter is
139 involved or in question in one suit that is not in the other.

That the issues in said suit are the same and necessarily involve a consideration of the same evidence. That prior to the commencement of the suit of The Defiance Water Company against The City of Defiance and The Council of the City of Defiance in this court the said court of common pleas of Defiance county, Ohio, had by its order and writ of injunction taken control and assumed and taken the right to direct the disposition of the subject-matter involved in both said suits and had therein acquired jurisdiction of all parties to this action and of the subject-matter of this suit, and the right and power to hear and determine all the controversies and questions relating thereto and dispose of the said subject-matter so in its control, and of which it assumed the right and power to determine the disposition.

Further that the said facts touching said commencement and pendency of said suit in said State court, the parties thereto and the subject-matter thereof are set forth at large and appear on the face of the plaintiff's bill herein; and that the plaintiff seeks relief herein touching the same matters and none other so at issue in said State court also appears from the said bill and amendment thereto; and these defendants further represent and show to your honors that by their demurrer herein they challenge the jurisdiction of this court to hear and determine said cause for the reason that said court of common pleas of Defiance county, Ohio, and not this court had jurisdiction thereof; and in and by their plea filed herein these defendants again showed the said facts aforesaid to this honorable court and challenge the jurisdiction of this court for the reasons above set forth; but said demurrers and plea were overruled; and finally by their answers these defendants again made the same questions as to and objected to the jurisdiction of this court in the premises.

140 For which reasons and other- apparent on the record in this cause said defendants pray for the stay of proceedings herein as aforesaid.

THE CITY OF DEFIANCE,
By GEORGE T. FARRELL,
City Solicitor.
THE COUNCIL OF THE CITY OF DEFIANCE,
By HARRIS & CAMERON, *Its Solicitors.*

(Endorsement:) No. 1473. In the U. S. circuit court, of northern district of Ohio, W. D. The Defiance Water Company, plaintiff, *vs.* The City of Defiance, *et al.*, defendant-. Motion. Filed, Jan. 9, 1900, Irvin Belford, clerk. George T. Farrell, Harris & Cameron, attorneys for def'ts.

141 R. W. C., Mar. 21, 1900.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *vs.* THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

On motion by defendants for staying proceedings.

In this case the defendants have moved for a stay of proceedings to abide the decision of the State courts of Ohio of a case there pending between these parties, involving the merits of the present controversy.

This motion is based upon the ground that the suit in the State court having been first commenced, that court had obtained jurisdiction of the subject-matter and that this court ought not to proceed with the present case until the determination of such former suit. It is undoubtedly the rule that where either the State or the Federal court has in a case pending before it taken control of certain property which it retains for the purpose of subjecting it to a final decision thereof, the Federal court in the one case or a State court in the other has no rightful authority to disturb that possession; and the determination of the court thus having possession will finally determine its status. So, also, it has been determined in the Federal court that when a final judgment has been rendered therein in a case which binds one of the parties to such judgment, the Federal court will enjoin the defeated party from prosecuting a suit in the State court for the purpose of depriving the other party of the fruits of the judgment. Perhaps the same rule would apply where a judgment has been rendered in a State court and the defeated party was seeking to defeat the other party through a suit instituted in the Federal court. On the other hand, the rule
142 is well settled that where there is a mere controversy between the parties without the possession by the court of any prop-

erty taken under its control for the purposes of the suit, the pendency of a suit in the State court involving the same subject-matter is no bar to the prosecution of a suit in a Federal court. See Ball *vs.* Tompkins—41 Fed. 486, where the distinctions are pointed out.

It follows that the complainant in this case has the right to proceed with the suit in this court and the court is bound to entertain such suit in the ordinary course. While this court will not go out of the ordinary course of procedure for the purpose of expediting the case so as to anticipate a judgment of the State court, it has no authority to hinder the plaintiff for the purpose of favoring proceedings in any other jurisdiction. The plaintiff will therefore be at liberty to enter the usual order for the taking of testimony under the rules; and if it shall be found that the time thereby provided for the taking of testimony is too short, application may hereafter be made for an extension of time upon showing sufficient cause therefor.

March 16th, 1900.

HENRY F. SEVERENS,
Circuit Judge.

(Endorsement:) No. 1473. U. S. circuit court, northern dist. Ohio. Defiance Water Co., *vs.* City & Council of Defiance. Opinion. Filed, Mar. 17, 1900, Irvin Belford, clerk.

143 (Entered) SATURDAY, *March* 17, 1900.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

This day came the parties by their solicitors and this cause came on for hearing upon the motion of the defendants for a stay of proceedings herein to abide the decision of the State courts of a cause therein pending between these parties, and the court being of the opinion that said motion is not well taken, it is ordered that it be and the same hereby is overruled. To which ruling and order the said defendants and each of them by their counsel then and there excepted.

(Endorsed:) O. K. Farrel & Harris & C. Newbegin.

(Entered) FRIDAY, *March* 23, 1900.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

On application of the complainant and for good cause shown the time for the said complainant to take and file its testimony in this suit by deposition under equity rule 68 is extended to Monday the

23rd day of April next, and the time of the defendants to take and file their testimony either by deposition or before an examiner of this court, is extended to Monday the 7th day of May next, with leave to the said complainant to take testimony in rebuttal only by deposition as above and file the same by Monday the 21st of May next; reasonable notice of the time and place of taking said depositions to be given by either party to the adverse party. Provided however that copies of any records duly certified by the proper officer and custodian thereof may be filed as evidence in the
144 court by either party within the time above limited and read in evidence at the hearing of this suit.

(Endorsed:) Approved for entry, H. F. Severens, circuit judge. March 22, 1900.

June Term, A. D. 1900, to wit, June 5, 1900.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

Order Granting Leave to Amend Prayer to Bill.

Upon application of the complainant and for good cause shown, it is hereby ordered by the court that leave be and the same is hereby given to the said complainant to amend its prayer in its bill for an account as follows; by striking out therefrom the words:—"including the said $500 balance for the first half of the year 1895, payable July 1st, 1895." And the same being accordingly done it is further ordered that the prayer to said bill be and the same is hereby amended as aforesaid; the costs of said amendment to abide the final order and decree of the court herein.

145 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE Council of the City of Defiance. } No. 1473. In Equity. Amendment to Prayer of Bill.

The said complainant The Defiance Water Company by leave of the court in that behalf first had and obtained, brings this its amendment to the prayer of its bill of complaint against the said defendants, and makes amendment of its prayer for an account by striking out therefrom the words "including the said $500 balance for the first half of the year 1895, payable July 1st, 1895."

HENRY & ROBERT NEWBEGIN,
Solicitors for Complainant.

(Endorsement:) No. 1473. The Defiance Water Co. *vs.* The City of Defiance, *et al.*, No. 1473. Amendment to prayer of bill of complainant. Filed, Jun- 5, 1900. Irvin Belford, clerk. H. & R. Newbegin, solicitors for compl't.

June Term, A. D. 1900, to wit, December 3, 1900.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE ET AL. } No. 1473. In Equity.

This cause is continued to the next term of this court.

146 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Plaintiff,
vs.
THE CITY OF DEFIANCE and THE COUNcil of the City of Defiance, Defendants. } In Equity. No. 1473.

Motion to File Supplemental Answer and Amendment to Original Answer.

Now comes the said defendants, The City of Defiance and The Council of the City of Defiance and show to the court that the said plaintiff filed its bill in this court against the said defendants and that the said defendants heretofore filed their answers to said bill, to which said plaintiff filed a replication, and that since that time under an order made herein proofs have been taken and filed.

That since said proofs have been so taken and filed in this court a final judgment and decree has been entered in favor of said The City of Defiance and against said The Defiance Water Company and The Council of the City of Defiance in a certain action in the circuit court of Defiance county, Ohio, between the same parties and involving the same subject-matter and thereby finally adjudicating and determining the matters in issue in this case.

And therefore these defendants move this honorable court for leave to file a supplemental answer and amendment to original answer, setting up the said adjudications; and further for leave to file a transcript of the record of said decree and a copy of the opinion of the judge announcing the decision of said court, as evidence supporting said answer.

GEORGE T. FARRELL,
City Sol'r, &
HARRIS & CAMERON,
Attorneys for Defendants.

(Endorsement:) No. 1473. In the circuit court of the United States. The Defiance Water Company, plaintiff, *vs.* The City of

Defiance and The Council of the City of Defiance, defendants. Motion to file supplemental answer and amendment to original answer. Filed May 2, 1901, Irvin Belford, clerk. George T. Farrell, city solicitor & Harris, Cameron & Shaw att'ys for def'ts.

147 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Complainant,
vs.
THE CITY OF DEFIANCE ET AL., Defendants. } # 1473. Equity.

Opinion of the Court.

WING, *J.*:

Leave is asked by the defendants, The City of Defiance and The Council of the City of Defiance, to file a supplemental answer and amendment to original answer.

The purpose of filing this pleading is to set out an adjudication in the circuit court in and for Defiance county of the matters in controversy between the complainant and defendants in this suit. A record of the proceedings in the State court which resulted in the decree sought to be pleaded, is before the court, and discloses an identity of issues in that case with those raised in the case in this court.

At an earlier term, the defendants made application in this court, by motion, for a stay of proceedings to abide the decision of the case, judgment in which is now sought to be pleaded, which was then a case pending. That motion was overruled by his honor Judge Severens, sitting as circuit judge. There has also been
148 an attempt by the defendants to plead the fact that a cause involving the same issues that are raised in this case was pending in the State court. The application of the defendants in that behalf was denied by his honor Judge Wanty, it being plainly the law that nothing short of a judgment in a State court can be available to a defendant, either by way of abatement or bar.

The validity of the contract alleged to have been made between the city of Defiance and the Defiance Water Company is the main issue in this cause, as it was also in the cause adjudicated by the circuit court for Defiance county. The jurisdiction of this court is founded upon the assumption that a valid contract existed between the parties named, which the council, by an ordinance, had attempted to rescind and annul. If there was no such valid contract, then the attempt of the council of the city of Defiance to rescind and annul it could not have been an invasion of any rights of the Defiance Water Company, secured to it by the Federal Constitution. The validity or invalidity of the contract involves chiefly an interpretation of the statutes of the State of Ohio. That interpretation can best be had in the State courts.

The right of the complainant to have any matters peculiar to the jurisdiction of this court considered here is fully protected, as the record discloses, by the fact that the constitutional question- raised

by the issues tendered in the bill in this case are raised by the answer filed in the State court.

I think the better practice requires that the matter set up in the pleading sought to be filed by the defendants should appear
149 by plea. The defendants, therefore, are granted permission to file the instrument tendered, as a plea, together with the certified record of the proceedings in the State courts which resulted in the decree described in the plea.

FRANCIS J. WING, *Judge.*

(Endorsement:) # 1473. United States circuit court, northern district of Ohio, western division. The Defiance Water Company, complainant, *v.* The City of Defiance, *et al.*, defendants. Opinion of the court. Filed, May 28, 1901, Irvin Belford, clerk.

150 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Plaintiff, *vs.* THE CITY OF DEFIANCE and THE Council of the City of Defiance, Defendants.	In Equity. No. 1473. Supplemental Answer and Amendment to Original Answer.

Now comes the said defendants, The City of Defiance and The Council of the City of Defiance, and by leave of court first had files this their supplemental answer and amendment to the original answer herein and aver and say:—

That heretofore on the 4th day of January, 1898, said defendant The City of Defiance, by Edwin A. Latty, its city solicitor, filed its petition in the court of common pleas of Defiance county, Ohio, against said plaintiff herein, The Defiance Water Company, and against said defendant herein The Council of the City of Defiance, as defendants, and caused summons to duly issue out of said court under the hand and seal of the clerk thereof to the sheriff of said Defiance county, Ohio, and procured service thereof to be duly made by said sheriff on said water company and said council; and thereby said city of Defiance, Ohio, commenced a suit against said water company and said council of said city, which was entitled:—"The State of Ohio, Defiance county, *ss.* Court of common pleas:—The City of Defiance, Ohio, by Edwin A. Latty, its city solicitor, plaintiff, *vs.* The Council of the City of Defiance, Ohio, and The Defiance Water Company, defendants;" and was numbered 6841 on the appearance docket of said court.

That in and by said petition in said action the said plaintiff therein (defendant in this action) averred and set forth that said city
151 of Defiance, Ohio, was a city of the fourth grade of the second class, that said Edwin A. Latty, was the duly elected, qualified and acting city solicitor, of said city, and that as such officer he brought said suit against the defendants thereto under sec. 1777, Revised Statutes of the State of Ohio.

"That said The Defiance Water Company was a corporation organized under the laws of the State of Ohio.

"That on the 17th day of August, 1887, said city of Defiance, Ohio by its council attempted to enter into a so-called contract with Samuel R. Bullock and Company for the supplying and furnishing of said Bullock and Company to said city and the citizens thereof with water for fire purposes, for the full term of thirty years thereafter, at a certain fixed yearly rental of not less that $5200.00 for each of said years, to be paid by said city to said company, for the water furnished for fire purposes.

"That said defendant, The Defiance Water Company, claims to be the sole and absolute owner by assignment, of said so-called contract, and of all the right, title, and interest, of said Samuel R. Bullock, and Company therein, and that said The Defiance Water Company, has presented to said council its bill for water rentals, amounting to $3142.50, claimed by said water company to be due it for water furnished to said city during the latter half of the year 1897, under and in accordance with the terms and provisions of said so-called contract, that no agreement whatever, for the supplying and furnishing of water to said city, save and except said so-called contract hereinbefore referred to, was ever entered into, between said city and said water company, or any other person or company under which it might claim.

152 "That unless restrained by this court from so doing, said city council, will cause said claim of said water company to be paid out of the public funds belonging to said city, and will also from time to time during the remainder of said term of said so-called contract cause to be also paid to said water company or its successors or assigns, out of the public fund of said city, large amounts of money for water rentals, alleged to be due by reason of water to be furnished said city under said so-called contract, and for which wrongful and unlawful acts, plaintiff has no adequate or proper remedy at law.

"That any such payment of any sum whatever to said water company arising under or for any water furnished said city, under said so-called contract, is a misapplication of the funds of the city, and an abuse of its corporate powers, and would constitute the performance of a contract made on behalf of said corporation, in contravention to the laws of said State governing the same, in this to wit:

"That said so-called ordinance is or purports to be in substance, an agreement or contract between said city and said Samuel R. Bullock and Company for the supplying of water for fire and other purposes to said city, and that by the express and specific terms and provisions thereof, it was for the duration of the full term of thirty years thereafter, and that such so-called contract has not, at any time, been ratified by the vote of the electors of said the city of Defiance, at any election therein, nor ever has been submitted to such voters for their ratification or rejection; and that said so-called contract is therefore invalid and void.

"That said so-called contract is illegal and void, for want of the

certificate of the city clerk of said city, (there being no city auditor in said city) that the money required for the payment of the debts obligations and liabilities thereunder was in the city treasury
153 to the credit of the fund from which it was to be drawn and the payment made.

"That by reason of the premises, that said water company is not entitled to demand, or to have or receive, any sum of money whatever from said city for any water already furnished said city or which it may hereafter furnish said city under the terms or provisions of said so-called contract."

That in and by said petition said plaintiff prayed, "that until the final hearing of this cause said defendant The City Council of the City of Defiance, Ohio, may be restrained by the order of this court, from paying or taking any proceeds whatever toward the payment of said claim of said defendant, The Defiance Water Company out of the public funds of said city, or from paying or attempting to pay out of the funds of said city any other or further claims of said, The Defiance Water Company, for water furnished said city, and that upon the final hearing thereof, such temporary restraining order may be made perpetual, and for such other and further relief as the premises may require."

That said plaintiff procured a temporary restraining order as prayed for against said defendants to issue out of said common pleas court and service thereof to be made on said defendants.

That afterward said defendant, The Defiance Water Company demurred to the said petition of the said plaintiff, against the said defendants for that said petition does not contain facts sufficient to constitute a cause of action. That on March 14th, 1899, said demurrer was submitted to the said court of common pleas and was sustained, and said plaintiff not desiring to plead further said petition of said plaintiff was dismissed and judgment for costs rendered against said plaintiff and in favor of said defendants in said court of common pleas.

154 That said plaintiff forthwith gave notice in writing of its intention to appeal said cause to the circuit court of Defiance county, Ohio, which notice within three days of the rendition of said judgment was entered in the journal of said court of common pleas and within thirty days plaintiff gave an undertaking for appeal in amount fixed by said court and conditioned as required by law, with sureties to the approval of the clerk of court, and caused a transcript duly certified by the clerk of said common pleas court and all original papers of said case to be filed in the office of the clerk of the circuit court and caused said case to be entered upon the appearance docket of said court and thereby appealed said case to said circuit court, and which case is No. 247 on the appearance docket of said circuit court.

That such proceedings were duly and regularly had in said circuit court, that said demurrer of said defendant, The Defiance Water Company to said plaintiff's petition was heard and overruled.

That afterward on the 10th day of February 1900, said The De-

fiance Water Company filed in said court its answer to said plaintiff's petition and thereby first denied:—

"That the payment of water supplied or to be supplied by this defendant to the said city of Defiance by the said city, is or will be a misapplication of the funds of the city, and an abuse of its corporate powers, and would be the performance of a contract made on behalf of said corporation, in contravention to the laws of the State governing same.

"That said contract has not at any time, been ever ratified by a vote of the electors of said city of Defiance, at any election therein, nor ever has been submitted to such voters for their ratification or rejection," and it denies that said contract is invalid or void.

155 "That said contract is illegal and void, for want of the certificate of the clerk of said city that the money required for the payment of the debts, obligations or liabilities thereunder was in the city treasury to the credit of the fund from which it was to be drawn, and the payment made" and denied,

That it "said water company is not entitled to receive payment from said city for water already furnished and to be furnished by it to the said city under the provisions of said contract" and

Second, said defendant in said answer set forth and averred that said plaintiff ought not to maintain its said suit against said defendants for that on the 17th day of August 1887, said city of Defiance, by its council duly passed a contract, entitled, "An ordinance to authorize and provide for the construction and maintenance of a system of water works in the city of Defiance, Defiance county, Ohio" and set forth in said answer the terms and provisions of said ordinance the same as they are set forth and averred in plaintiff's bill in this suit. And said defendant further set forth the acceptance of said contract ordinance; the giving of bond, the constructiou of said water works, the transaction of said Boody, McClellan & Co. N. T. Sprague and Dennis, Long & Company and Samuel R. Bullock & Company; the organization of said water company; the assignment by Bullock & Company to said water company, the test and acceptance of said water plant by said city council, the cost of said plant; the amounts of stock and bonds outstanding; that Dennis, Long & Company and Boody McClellean & Company and N. T. Sprague believed said city would comply with said contract and took said bonds and constructed said plant relying on the council's promise that it would comply with said contract; the income and resources of said company; statements touching the construction of mains

156 lines, and hydrants; the use and control of said water, hydrants and property, by said city, furnishing of water by said company and the use thereof by said city, the payments made by said city, that the said city council, have refused to allow to pay anything for the use of water since the commencement of said suit by said city, except the sum of $756.00 and that said city refuses to give up possession of said hydrants and claims it owes said water company nothing whatever for said property or water, all as the same are set forth and averred in said plaintiff's bill and amendments and supplements herein; and therein alleging the passage by

the said city council, on January 7th 1896, of the ordinance of that date, and that it thereby abrogated the said contract between said water company and said city contrary to the provisions of article II sec. 28 of the constitution of the State of Ohio, and article I sec. 10 of the Constitution of the United States, all as averred in plaintiff's bill in this suit; and further therein aver-ing in bringing said suit, certain collusions confidences and conspiranc-es between said council and solicitor; the duties of said city council, the presumption of law touching their liability and action, what will not be permitted said city to do and allege, that said city will be and is estopped; what the object and prayer of said city's said petition in fact was, that no tender back of said property to said water company was made in said petition, what the effect of granting the prayer of said petition would be, all in letter or substance as set forth in the bill and supplemental bill and amendments filed in this suit, and therein further aver-ing that by reason of the said facts in said answer the said City of Defiance was barred and estopped from averring or claiming said contract of August 17th 1887 was or is invalid, or from refusing
157 to perform and carry out the same, or from disputing or refusing to pay said water company's bills thereunder and that said city was barred and estopped from having or maintaining its said action against said water company and said council, or from having any relief therein prayed for. Said The Defiance Water Company in and by its said second paragraph of its answer further set forth and averred that said The Defiance Water Company, by its bill in equity in this court against said City of Defiance and said City Council of said city as joint defendants, to which bill the said defendant- thereto had each answered and said complainant had replied to said answers, it is sought by said water company to collect the water rentals claimed to be due said company from said city under said ordinance and contract; and that if the prayer of said plaintiff's petition in said suit in said State court should be granted it would enjoin said water company from further prosecuting said suit in said Federal court or from otherwise collecting said rentals and averring further that the hearing of said suit in said State court ought to be postponed till after the final determination of said suit in said circuit court of the United States. These defendants aver that said The Council of the City of Defiance failed to answer or demur to said petition of said plaintiffs in said action in said State court. These defendants aver that on the 22nd day of February 1900 the said City of Defiance filed in the said circuit court of Defiance county, Ohio, its reply to said answer of said water company and thereby admitted that said water company had commenced this suit in equity and that it was to recover for hydrant rental due on the contract sought to be set aside and declared illegal and void in and by the said suit in the State court, but averred this suit was commenced long after the commencement of said suit in said State court, and said plaintiff denied each and every, all and
158 singular the facts, acts and things alleged in said answer as ground of estoppel of said city from having or maintaining its said action or from obtaining the relief therein prayed for,

and denied all fraud, confederation, collusion or conspiracy, and denied the full, complete, or substantial performance by said water company of all, any or either of the terms or provisions of said alleged contract of August 17th 1887.

That at the March, 1901, term of said circuit court of Defiance county, Ohio, said cause was heard in and by said court on the said petition, answer and reply, proofs and exhibits and submitted to the court and a final decree rendered upon the merits in and by said court on the 15th day of March 1901, whereby it was determined and adjudged and decreed that the equity was with The City of Defiance, Ohio, plaintiff in said cause, and against said defendant, The Council of the City of Defiance, and The Defiance Water Company that said contract attempted to be entered into on August 17th 1887 by and between said city of Defiance and Samuel R. Bullock and Company was and is unauthorized, in contravention of law, prohibited, illegal and void, and that the said council of the city of Defiance, was without power or authority to make or enter into the same or to pay money to said water company under said contract and that any payment for water rental thereunder would be a misapplication of the funds of said city and that said plaintiff is entitled to the relief in its said petition prayed for, and that said The Council of the City of Defiance, and The Defiance Water Company be and they were thereby perpetually enjoined and restrained from executing or carrying out said contract, evidenced by said ordinance of August 17th 1887, and said council be and it was perpetually enjoined and restrained from paying or taking any proceedings whatever toward the payment of any claims made by said water company for water furnished under said contract and that said
159 plaintiff recover of said water company its costs, and that said water company and said council pay their own costs and execution was awarded therefor.

These defendants aver that said contract so adjudged and declared void, is the same contract described and set forth in plaintiff's bill herein, and that the whole of the subject-matter of this suit is the same as that in said suit in said State court, and which was so as aforesaid adjudicated and determined in said State court and that the parties to this suit are the same as those in said State court, and that said judgment and decree still remains in full force and effect not in the least reversed, satisfied, or made void, and this the said defendants are ready to verify.

Wherefore these defendants pray judgment if the said plaintiff ought to have or maintain the aforesaid suit against them or either of them in this court.

GEORGE T. FERRELL,
City Solicitor for the City of Defiance.
THE COUNCIL OF THE CITY OF DEFIANCE,
By HARRIS & CAMERON,
Its Solicitors.

160 STATE OF OHIO, *Defiance County,* } ss:

Joseph A. Evans, being first solem-ly sworn, says he is the mayor of The City of Defiance, one of the defendants herein, and that the foregoing ple- is not interposed for delay, and that the same is true in point of fact.

JOSEPH A. EVANS.

Sworn to before me and in my presence subscribed by the said Joseph A. Evans, this 14th day of June, A. D. 1901.

[SEAL.] EDWIN J. PHELPS,
Notary Public in & for said County.

STATE OF OHIO, *Defiance County,* } ss:

J. Isadore Hoeffle, makes oath and says that he is a member and the president of The Council of The City of Defiance, one of the defendants herein, and that the foregoing plea is not interposed for delay and is true in point of fact.

J. ISIDORE HOEFFEL.

Sworn to before me and in my presence subscribed by the said Isadore Hoeffle, this 14th day of June, A. D. 1901.

[SEAL.] EDWIN J. PHELPS,
Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

GEORGE T. FARRELL,
Solicitor for The City of Defiance,
Defendant Above Named.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

HENRY B. HARRIS,
Of Counsel for Defendant
The Council of the City of Defiance.

(Endorsement:) No. 1473. In the circuit court of the United States N. dist. Ohio, W. D. The Defiance Water Company, plaintiff, *vs.* The City of Defiance and The Council of The City of Defiance, defendants. Supplemental answer and amendment to original answer. Filed, May 28, 1901, Irvin Belford, clerk. George T. Farrell, city sol'r and Harris, Cameron & Shaw, attorneys for defendants.

161 June Term, A. D. 1901, to wit, June 17, 1901.

Present: The Honorable Francis J. Wing, U. S. district judge.

DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE, OHIO, ET AL. } In Equity. 1473.

This cause now coming on for hearing on the motion of the defendants for leave to file a supplemental answer and amendment to original answer, and for leave to file a transcript of the record from the circuit court of Defiance county, Ohio, the court, on consideration thereof, grants permission to the defendants to file the instrument tendered, as a plea, together with the certified record of the proceedings in the State courts, which resulted in the decree described in the plea. And the clerk is ordered to change the title of the pleading tendered from "supplemental answer and amendment to original answer" to "plea," and to file the same as of this date. To which orders of the court the complainant excepts.

JUNE 17, 1901.

In accordance with the foregoing order of court, the pleading heretofore, on May 28, 1901, filed as a "supplemental answer and amendment to original answer," is this day refiled with the following endorsement to wit:

No. 1473. In the circuit court, of United States, N. dist. Ohio, W. D. The Defiance Water Company, plaintiff, *vs.* The City of Defiance and The Council of the City of Defiance, defendants. Plea. Filed, June 17, 1901, Irvin Belford, clerk. George T. Farrell, city sol'r and Harris & Cameron & Shaw, attorneys for defendants.

162 (Entered) WEDNESDAY, *June* 26, 1901.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and Another. } In Equity. No. 1473.

This day this cause came on to be heard upon the sufficiency of the supplemental plea filed herein on the 17th day of June, A. D. 1901, and the same was argued by counsel, and the court being fully advised in the premises is of the opinion that the said plea is sufficient in law; to which ruling of the court the complainant by its counsel duly excepted at the time.

And the said complainant has leave to file a special replication to said plea by the first Monday in August, 1901.

Enter above.

FRANCIS J. WING, *Judge.*

163 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY *vs.* THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } In Equity. No. 1473. Replication.

This repliant, The Defiance Water Company, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea of the said defendants, The City of Defiance and The Council of the City of Defiance, filed herein June 17th, A. D. 1901, for replication thereunto saith that it doth and will aver, maintain and prove its said bill as to all the demands therein contained to be just and true, certain and sufficient in the law, and that the plea of the said defendants is untrue, uncertain and insufficient in the law to be replied unto by this repliant for divers manifest errors and uncertainties therein contained; without that, that any other matter or thing in the said plea contained materially or effectually in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

HENRY & ROBERT NEWBEGIN,
Solicitors for said Repliant.

(Endorsement:) No. 1473. In equity. U. S. C. C. N. D. O. W. D. The Defiance Water Company *v.* The City of Defiance, *et al.* Replication to defendants' plea. Filed, Aug. 5, 1901, Irvin Belford, clerk. Henry & Robert Newbegin, solicitors for repliant.

164 (Entered) MONDAY, *August* 5, 1901.

THE DEFIANCE WATER COMPANY *vs.* THE CITY OF DEFIANCE ET AL. } No. 1473. In Equity. Order as to Taking Testimony.

Ordered that on the issue formed by the supplemental plea of the defendants filed herein on the 17th day of June, A. D. 1901, and the replication thereto filed of this date, the said defendants may file any documentary evidence, and testimony taken by them before an examiner of this court under equity rule 67 or by deposition under rule 68, additional to that now on file in support of their said plea, relevant to the said issue, within sixty days; and that the said plaintiffs may file such evidence and testimony taken as aforesaid in reply thereto within ninety days.

Enter above,

FRANCIS J. WING, *Judge.*

June Term, A. D. 1901, to wit, October 12, 1901.

Present: The Honorable Francis J. Wing, U. S. district judge.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE ET AL. } No. 1473. In Equity.

This cause is continued to the next term of this court.

165 December Term, A. D. 1901, to wit, December 21, 1901.

Present: Honorable Francis J. Wing, district judge.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } In Equity. No. 1473. Decree.

At the December 1901, term of this court, viz: on the 21st day of December A. D. 1901, this cause came on for hearing and the court announced that the cause was for hearing on the plea of *res adjudicata* filed herein by the said defendants on the 17th day of June A. D. 1901 by leave of this court. To which statement and announcement said complainant by its counsel objected, and orally requested and moved the court to hear the cause upon the issues made by the bill as amended the supplemental bill, the answer and the replication thereto, and offered to give in evidence in support thereof its proofs filed in the case which request the court refused, to which ruling and decision of the court the complainant, by its council, objected and excepted.

Thereupon, the complainant, by its counsel orally requested and moved the court to hear the cause upon all the issues made in the case, the said issues as above made and the issues raised by the said plea of the said defendants and the replication thereto, and the complainant offered to give in evidence the proofs filed in the case in support of said issues all of which the court refused, save and except the evidence as to the issues raised by the said plea and by the replication thereto, to which ruling and decision of the court the complainant, by its counsel, objected and excepted.

166 Thereupon the said defendants in support of their said plea, offered in evidence a transcript of the record of the circuit court of Defiance county, State of Ohio, in the case of The City of Defiance Ohio, by Edwin A. Latty, its city solicitor, *vs.* The Council of the City of Defiance, Ohio, and The Defiance Water Company, cause No. 247, in said circuit court, together with the certificates thereunto attached and a part thereof, which transcript and certificates heretofore, by leave of this court were filed herein in support of said plea, and endorsed "Filed May 28th 1901." To the receiving of said certified transcript in evidence the complainant, by its council objected, on the ground that it does not purport to be, and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case. But the

court overruled the objection of the complainant and permitted the said certified transcript to be given in evidence; to which ruling and decision of the court the complainant objected and excepted.

And the defendants gave in evidence no other proof in support of their said plea.

Thereupon the complainant offered in evidence its proofs filed in the case.

First. A transcript of the record and proceedings of the said circuit court of Defiance county, in the said cause of The City of Defiance by Edwin A. Latty, its city solicitor *vs.* The Council of the City of Defiance, etc. No. 247; to which the defendants objected, for that the said transcript is not certified as required by law, and for that the said evidence offered is incompetent, irrelevant, and immaterial, and does not tend to dis*ap*prove any issue tendered or evidence given by the said defendants or to prove any issue tendered
167 by said complainant, and the court sustained the objection and refused to receive the said transcript or any part thereof in evidence, expressly stating at the time that the refusal was not on the ground that the transcript was not duly certified, to which ruling and decision of the court the complainant objected and excepted.

Second. The deposition of W. A. Schmaltz, to which the defendants objected for that the said evidence offered is incompetent, irrelevant and immaterial and does not tend to disprove any issue or evidence given by the said defendants or to prove any issue tendered by the complainant and the court sustained the objection and refused to receive the same or any part thereof in evidence; to which ruling and decision of the court the complainant objected and excepted.

Third. A transcript of the adjournment *sine die* of the March term A. D. 1901, of the circuit court of Defiance county, to which the defendants objected for the same reasons as given for their first objection above, and the court sustained the objection and refused to receive said transcript as evidence; to which ruling and decision of the court the complainant objected and excepted.

Thereupon the cause was submitted to the court by the said parties, and the court being fully advised in the premises is of the opinion and finds that the said plea ought to be sustained; to which finding and decision the complainant by its council, objected and excepted.

Thereupon the complainant orally requested and moved the court to hear the cause upon the issues formed by the bill as amended, the supplemental bill, the answer and the replication thereto, on the ground that the said plea does not reach the whole of said issues and that as to them said plea ought not in law and in equity to avail the defendants; and the complainant offered to give in
168 evidence its proofs on file in support of said issues; but the court refused the said request and motion and held that said plea extended to and was conclusive of all of said issues to which ruling and decision of the court the complainant by its counsel, objected and excepted.

It is therefore ordered, adjudged and decreed by the court that the complainant's bill as amended, and its supplemental bill be, and the same are hereby dismissed with costs to the said defendants to be paid by the said complainant to all of which the complainant by its counsel objected, and excepted.

Thereupon the said complainant by its counsel, prayed an appeal from the decree and order of the court to the Supreme Court of the United States, which appeal is allowed upon the complainant's giving a supersedeas bond in the sum of five hundred dollars ($500).

And for good cause shown the clerk has ninety days within which to prepare a transcript of the record and proceedings herein for filing in the said Supreme Court of the United States.

169 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } In Equity. No. 1473.

Assignment of Errors.

The said plaintiff in praying an appeal to the Supreme Court of the United States assigns the following errors in the rulings, action orders, and decree of the said circuit court appearing in the record and proceedings in this cause.

First. The court erred in its order made and entered herein on the 17th day of June A. D., 1901, in permitting the said defendants to file herein the paper-writing called a "plea;" and further erred in permitting the defendants to file with said plea, the so-called "certified record of the proceedings in the State courts." Which resulted in the decree described in the plea as evidence on which said order was made. Said record being filed herein on May 28th 1901. The certificate to said record does not show it to be a complete transcript of the record and proceedings in the case in said State court nor does it purport to be made by the clerk of the circuit court of said Defiance county; such certificate being as follows; to wit:

170 "In the Circuit Court of Defiance County.

"THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor,
vs.
"THE COUNCIL OF THE CITY OF DEFIANCE and THE Defiance Water Company. } No. 247.

"I, W. A. Schmaltz, clerk of courts, hereby certify that the above and foregoing is truly taken and correctly copied from the final record of this cause.

"Witness my hand and official seal this 3rd day of May A. D. 1901.

[Seal of the Circuit Court.]

"W. A. SCHMALTZ,
"*Clerk of the Courts of Defiance County, Ohio.*"

Second. The said court erred in its order made and entered herein on or about June 26th 1901, holding the said supplemental plea, sufficient in law.

Third. The said circuit court erred at the final hearing of this cause in refusing to hear the cause upon the general issues made by the bill as amended and the supplemental bill, the answer and replication and the proofs offered by the plaintiff in support of said issues.

Fourth. The said court erred at the final hearing in refusing to hear the cause upon all the issues made in the case, including the said supplemental plea and replication thereto and the proofs offered by the plaintiff in support of said issues.

Fifth. The said court erred at the final hearing of the cause in permitting the defendants to give, and in receiving in evidence
171 over the objection of the plaintiff, the said transcript of the record of the circuit court of Defiance county, Ohio, in the said case of The City of Defiance etc. *vs.* The Council of the City of Defiance and The Defiance Water Company, for the reason given in the plaintiff's objection thereto at the time, to wit, that the same does not purport to be, nor does the certificate of the clerk of said court show it to be a complete transcript of the record of, and proceedings in the case and that the same is not duly certified. The said certificate of the clerk is set out in full in first assignment of error herein, *supra.*

Sixth. The said court erred at the final hearing of the cause in refusing to receive in evidence on the issue made by the said supplemental plea and the replication thereto the whole or any part of the proofs offered by the plaintiff, to wit: Said court erred in refusing to receive in evidence:

The transcript of the record and proceedings of the said circuit court of Defiance county Ohio, in said case of The City of Defiance, etc., *vs.* The Council of the City of Defiance and The Defiance Water Company, or any part thereof. The certificate of the clerk thereto showing the same to be a full and complete transcript of the record and proceedings in the said case being as follows:

"Circuit Court of Defiance County.

"THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
"THE COUNCIL OF THE CITY OF DEFIANCE and THE Defiance Water Company, Defendants. } No. 247.

"I, W. A. Schmaltz, clerk of the circuit court, within and for the county of Defiance, State of Ohio, do hereby certify that the follow-

ing is a true full and correct transcript of the record, pro-
172 ceedings and original papers as they appear on the records and files of the said circuit court in my office in the above-entitled case.

"Witness my hand and the seal of said court, this 25 day of October, A. D. 1901.

[Seal of the Circuit Court.]

"W. A. SCHMALTZ, *Clerk.*"

Said court erred in refusing to receive in evidence: The depositions of the witness William A. Schmaltz, or any part thereof.

Said court erred in refusing to receive in evidence: The transcript of the record of the adjournment *sine die* of the March term, A. D. 1901 of the said circuit court of Defiance county, Ohio, said adjournment being on March 15th 1901, as follows:

"Court adjourned *sine die.*"

For that had said proofs been received in evidence it would have been conclusively proved that the said so-called judgment of the said circuit court of Defiance county, set up in said plea was a nullity, having been made and ordered to be entered by the judges of the court and entered by the clerk of said court, all forty-one days after the adjournment of the said March term, 1901 of the court and after the court had lost jurisdiction of the case.

Seventh. The said court erred in its opinion and finding that the said plea ought to be sustained.

Eighth. The said court erred in its order refusing to hear the cause upon the issues formed by the bill as amended, supplemental bill, answer and replication thereto, to which the said supplemental plea did not reach, and as to which the said plea ought not in law or equity to avail the defendants; and the court erred in overruling the plaintiff's request and motion for leave to give in evidence
173 its proofs filed in support of said issues.

Ninth. The said court erred in holding that said plea extended to the whole of said issues and that it was conclusive of the same.

Tenth. The said court erred in its final decree in favor of the defendants and in dismissing the suit with costs to said defendants.

Wherefore the plaintiff prays that upon final hearing hereof in the Supreme Court of the United States the said decree of the said circuit court may be reversed and this plaintiff restored to all that it has lost thereby.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Solicitors for the said Plaintiff, The Defiance Water Company.

(Endorsement:) No. 1473. U. S. circuit court northern dist. of Ohio, western division. Defiance Water Co.—*vs.*—City of Defiance *et al.* Assignment of errors. Filed Dec. 21, 1901, Irvin Belford, clerk.

174 Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Appellant,
against
THE CITY OF DEFIANCE and THE COUNCIL OF THE CITY OF DEFIANCE, Respondents.

Know all men by these presents, that we, the Defiance Water Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and Peter Kettenring of the city of Defiance in the county of Defiance and State of Ohio, are held and firmly bound unto the above-named The City of Defiance and The Council of the City of Defiance in the sum of five hundred dollars, to be paid to the said The City of Defiance and The Council of the City of Defiance, for the payment of which well and truly to be made, we bond ourselves, and each of us, our and each of our successors, assigns, heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the 20th day of January in the year of our Lord one thousand nine hundred and two.

Whereas, the above-named The Defiance Water Company has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit, by the circuit court of the United States, for the northern district of Ohio, western division.

Now therefore, the condition of this obligation is such, that if the above-named The Defiance Water Company shall prosecute said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void, other-
175 wise the same shall be and remain in full force and virtue.

In witness whereof, the Defiance Water Company has hereunto caused this bond to be signed by its president and its seal to be affixed by its secretary this 20th day of January, A. D. 1902.

[Corporate Seal.]

THE DEFIANCE WATER COMPANY,
By GEO. S. LONG, *President.*

Attest: W. J. McGONIGALE, *Secretary.*

PETER KETTENRING.

Bond approved:
FRANCIS J. WING, *Judge.*

(Endorsement:) No. 1473. U. S. circuit court, northern dist. of Ohio, western division. The Defiance Water Co. *vs.* The City of Defiance, *et al.* Bond on appeal. Filed Feb. 7, 1902. Irvin Belford, clerk.

176 December Term, A. D. 1901, to wit, February 7, 1902.

Present: The Honorable Francis J. Wing, U. S. district judge.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE ET AL. } #1473. In Equity.

This day came the said complainant, and filed its appeal bond in the sum of five hundred dollars with good and sufficient surety, and the same is hereby approved.

177 JAN'Y 7TH, 1896.

A resolution to draw warrant in favor of water company for $3,160.00.

Whereas, the Defiance Water Company have submitted a bill to the city council for $3160 alleged to be due them from said city for water rental for the past six months, and

Whereas, said council are of the opinion that no valid contract exists, or is between said city and said company for the payment of the same and furthermore, that said bill is, in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity, and

Whereas; the best interests of the city, in their opinion, demand that the present service be discontinued and immediate steps be taken for the purpose of supplying water to said city upon fair and equitable terms, therefore;

Be it resolved that the city clerk is hereby directed to forthwith draw his warrant on the city treasurer against the water fund of said city for said sum of $3160.00, in favor of said Defiance Water Company in full payment of said bill, provided, however that if said warrant be accepted by said company, it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgement of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rates be made to said company.

Passed Jan. 7th, 1896.

H. D. BOKOP, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:—

178 Ayes: Anderson, Bokop, Coy, Diehl, Hatry, Kingsbury, Kniss, Krotz,—8.

I J. J. Malley, clerk of the city council of the city of Defiance, Ohio do hereby certify that the above and foregoing resolution is a true copy taken from the records of the city council of the city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

(Endorsement:) No. 1473. Copy of resolution Jan'y 7th, 1896. Filed Dec. 30 1898. Irvin Belford, clerk. Harris & Cameron, attorneys

179 *Notice to Take Depositions.*

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Plaintiff,
vs.
THE CITY OF DEFIANCE & THE COUNCIL OF the City of Defiance, Defendants.
} Case No. 1473. In Equity.

The above-named defendants will take notice that on Tuesday the 6th day of February A. D. 1900, the plaintiff above named will take the depositions of David A. Boody, and Mr. McLellan of the firm of Boody McLellan & Co. of New York city, George J. Long and other sundry witnesses, to be used as evidence in the trial of the above cause, in behalf of the plaintiff at the office of Henry and Robert Newbegin in the city of Defiance, in the county of Defiance in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

H. & R. NEWBEGIN,
Attorneys for Plaintiff.

Dated Feb'y 3rd, 1900.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exception as to time.

Done this — day of —— A. D. 18—:

—— ——.
—— ——.

180 Caption.

Depositions of Charles W. McLellan and George J. Long, taken before me, Edwin J. Phelps a notary public within and for the county of Defiance, in the State of Ohio, pursuant to the foregoing notice, and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in a suit pending in circuit court of the United States for the northern district of Ohio, western division, wherein The Defiance Water Company is plaintiff and The City of Defiance and The Council of the City of Defiance are defendants; Henry and Robert Newbegin being present on behalf of plaintiff, and Jno. P. Cameron, of the firm of Harris & Cameron, and George T. Farrell, city solicitor of the said city of Defiance, being present as counsel for the defendants.

And thereupon the said witnesses, CHARLES W. MCLELLAN and GEORGE J. LONG, being by me severally first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth

and carefully examined. (Counsel for the defendant, before the taking of these depositions objected and protested to the taking of any testimony at this time in this cause under the notice given herein for that purpose for the reason that there is now pending in this case in the circuit court of the United States for the northern district, western division of Ohio for the reasons stated and set forth in said motion.)

181 The said CHARLES W. MCLELLAN having been first duly sworn as aforesaid testified as follows:—In responce to interrogatories propounded by Mr. Henry Newbegin:

(Counsel for the defendants object to the taking of the testimony of Charles W. McLellan for the reason that no such person is named in the notice to take depositions.)

Q. Mr. McLellan, state what office if any, you hold for the Defiance Water Co.

A. Treasurer.

Q. How long have you held that office?

A. Some seven or eight years.

Q. State whether or not you are a member of Boody, McLellan & Co.

A. I am.

Q. And are you the Mr. McLellan who is known in that firm of the partnership of Boody, McLellan & Co. of the city of New York?

A. Yes sir.

Q. You may state now whether or not you have knowledge of the total cost of the construction of the water works of the Defiance Water Company including all of its additions and subsequent mains and improvements of the plant up to the time that they were finally completed as they now exist?

A. Yes sir.

Q. You may state now what that cost was?

(Counsel for the defendant- object to this.)

A. At least $196,000.00.

(Counsel for the defendant- object to the answer.)

Q. You may state what interest, if any, or monies if any, the firm of Boody McLellan & Co. had in the original company of Samuel R. Bullock & Co. at the time they started out to construct these works or later for monies loaned or otherwise put into the construction of the works.

182 (Counsel for the defendants object to this question.) Question withdrawn.

Q. Do you remember the fact of S. R. Bullock & Co. failure here?

A. Yes sir.

Q. Who were they?

A. They were a firm building water works.

Q. Building these water works here?

A. Yes sir, building these water works.

Q. Now state how much interest in cash, represented by cash, the firm of Boody, McLellan & Co. had in the Defiance Water Co. at the time of the failure of S. R. Bullock & Co. here either for loans made to Bullock & Co. or for cash paid directly into the water Co. at the time of the failure?

(Counsel for defendant- object to this question.)

A. I can't tell the exact amount we had advanced them on the bonds of the company.

Q. Was it about the amount of $100,000.00?

(Counsel for defendant- object to this question.)

A. It was about that amount.

Q. After that, Mr. McLellan, did Boody, McLellan & Co. put in any more money into the water Co. down to the time of the final completion of the water works?

(Counsel for defendant- object to this question.)

A. Yes sir.

(Counsel for defendant- object to this answer.)

Q. State about how much, if you remember?

(Counsel for defendant- object to this question.)

A. At least $27,000.00 or $28,000.00.

Q. State whether or not any bonds and whether any bonds of this company were issued and if so, for what purpose?

(Counsel for defendant- object to this question.)

A. Yes sir, and for the purpose of making extensions as they were asked for by the city of Defiance.

183 (Counsel for the defendants object to this answer.)

Q. Was that the only purpose?

(Counsel for the defendants object to this question.)
Last question withdrawn.

Q. State whether or not this actual cost of $196,000.00 down to the time of the completion of the water works was secured in any manner by those who put the money, in and if so, how?

(Counsel for the defendants object to this question.)

A. It was secured by the issue of bonds upon the property.
Q. What is the total amount of the bonds issued?
A. $200,000.00 provided for.
Q. Actually issued?

(Counsel for the defendants object to this question.)

A. About 197 of the bonds were issued, I think.
Q. I want the amount in dollars?
A. $197,000.00 at least.

Q. Do you know the total amount of the stock of the corporation?

(Counsel for the defendants object to this question.)

A. $200,000.00.

Q. What is the value of that stock? If you know.

(Counsel for the defendants object to this question.)

A. No value.

Q. Do you know a man by the name of N. T. Sprague?

A. Yes sir.

Q. What interests if any, did he have in the Defiance Water Co. at the time of the failure of S. R. Bullock & Co. or later, for loans made to it or them in money or other cash or property put into the construction of its water works?

(Counsel for the defendants object to this question.)

A. I don't know.

184 Q. You may state what rate of interest those bonds bear if any?

(Counsel for the defendants object to this question.)

A. 6%.

Q. Do you know whether or not the interest has been kept paid up on them?

A. Yes I know it has not.

Q. State how much, if you know, interest is in default on those bonds?

(Counsel for the defendants object to this question.)

A. Several years. I can't give it exactly.

Q. State, whether or not you know the net revenue after payment of all expenses of operation that would be derived from these water works here in Defiance if the city had paid in full each year its rentals you claim to be due for hydrant- under the contract the company had with them?

(Counsel for the defendants object to this question.)

A. I have an idea.

Q. How much would it be?

(Counsel for the defendants object to this question.)

A. Possibly two and one half or three per cent. on the amount of the bonds.

Q. And did you wish to be understood in your previous answers that the total cost in cash of the works and the amount of the bonds issued by the company were the same?

(Counsel for the defendants object to this question.)

A. Yes, the amount of money spent and the amount of the bonds were the same.

Cross-examination by Mr. JNO. P. CAMERON, of counsel for defendant-:

Q. Were you personally acquainted with the members of the firm of S. R. Bullock & Co.?

A. No sir. I knew Mr. Bullock only.

185 Q. Who was the company?

A. I don't know.

Q. What did you mean when you said "When Boody, McLellan & Co. had $\frac{85}{150}$ and Dennis Long & Co. had $\frac{65}{150}$ interest in the company of S. R. Bul-ock & Co."?

A. I didn't say S. R. Bullock & Co. I said in the Defiance Water Co.

Q. Do you know of your personal knowledge the amount of material money, etc., that your company furnished in the construction of the water works here, the Defiance water works?

A. Yes sir.

Q. When was this money and material furnished to the Defiance Water Company?

A. At different times in the last twelve years or since the commencement of the construction.

Q. Can you give us the dates and amounts of money furnished?

A. I have not any record of it here,

Q. Can you give us the dates when any of the material was furnished?

A. We furnished all cash.

Q. How much money was furnished by your company to S. R. Bullock & Co. previous to his assignment or failure?

A. I know that we furnished money, cash to him. I cannot state the exact amount.

Q. Can you state approximately the amount?

A. It would have to be too much of a conjecture.

Q. Now Mr. McLellan do you know of your own knowledge, whether the money which you did furnish S. R. Bullock & Co. went into the construction of the Defiance water works?

A. I wasn't there to see it spent.

Q. Then, as a matter of fact, you don't know that S. R. Bullock & Co. spent the money which your firm furnished them in the

186 construction of the water works at Defiance, do you?

A. Not of my own knowledge.

Q. After the failure of S. R. Bullock & Co. the Defiance water works was incorporated, was it not?

A. I don't know.

Q. You was a stockholder in the Defiance water works, were you not? at the time of its organization?

A. No, I was not personally.

Q. Was the firm of which you are a member, that is the firm of Boody, McLellan & Co. a stockholder at the time of the organization and incorporation of the Defiance Water Co.?

A. It is my impression that the stock we now hold was taken at that time.

Q. How much stock did your firm hold?

A. 694 shares. Par value, $69,400.00.

Q. How many bonds did the firm of Boody McLellan & Co. get in the Defiance water works? at the time of the issue of the bonds?

A. We, with N. T. Sprague hold $111,000.

Q. How many of these bonds did your firm get and when did they get them?

A. We and N. T. Sprague got them jointly.

Q. That is, the $111,000 that you mentioned?

A. Yes sir.

Q. What is the ....erest that Boody, McLellan & Co. owned in the $111,000.00 worth of bonds? What part of those bonds did they own?

A. They owned one-half of them.

Q. Can you give us the date when you got those bonds, Mr. McLellan?

A. No, I cannot.

Q. Were they delivered to your firm at or about the time the bonds bear date?

A. I think so.

187 Q. How much did your firm pay for those bonds?

A. I cannot say, I think par.

Q. Were you treasurer of the Defiance Water Co. at the time these bonds were issued?

A. Yes sir.

Q. As treasurer did you have the possession of the bonds prior to their delivery?

A. Not in any formal way, they were in possession of the firm of Boody McLellan & Co.

Q. The bonds of the Defiance Water Co. that were issued were all taken by the stockholders of the Defiance Water Co. were they not?

A. The largest amount of them were.

Q. Were they not all taken by the stockholders?

A. There were some stockholders that had no bonds.

Q. But the bonds were all taken and owned and held by the stockholders?

A. By the stockholders for money that they had put into the work. Dollar for dollar of the bonds issued.

Q. And no person not a stockholder held these bonds or any of them.

A. Not to my knowledge.

Q. Did you as treasurer of this company ever receive a dollar or any other amount of money for these bonds?

A. Well, I could say yes, but I know the bonds represented the actual money spent on the water works here.

Q. Isn't it true Mr. McLellan that the greater proportion of this money was spent prior to the organization of the Defiance Water Co. in the construction of the water works? and afterwards the Defiance Water Co. was organized, and incorporated, and that Dennis Long & Co. Boody, McLellan & Co., and N. T. Sprague took stock in the

water Co. for an amount equal to the money which they had advanced in the construction of the water works?

188 A. Yes, they took stock in proportion to the money which they had put into the works.

Q. How much stock did these different companies, or firms take in the Defiance Water Co. at that time?

A. I don't know.

Q. Do you know how long after the organization of the water Co. these bonds were issued?

A. Some time after, I can't give you the exact months or days.

Q. About how long afterwards?

A. I can't say.

Q. When were you elected treasurer of the company?

A. I can't recall.

Q. How many years have you been treasurer?

A. I have stated previously that it was eight or nine, and I thought afterwards that it was nearer ten.

Q. S. R. Bullock & Co. were building water works at different places in the State of Ohio at about the time they were building water works at Defiance, were they not?

A. That I don't know.

A. Mr. McLellan, was any money taken into the water Co. and to you as treasurer of the company coming from the sale of the bonds of the company?

A. Yes sir.

Q. How much?

A. I should have to refer to our books in New York for the amount.

Q. About how much?

A. I have stated before about $196,000.00 represented by the bonds.

Q. Was that paid in cash?

A. The money had been spent in instances before these bonds were delivered, but when delivered they represented this money spent.

189 Q. And part of this money was money that had been advanced or paid to S. R. Bullock & Co.?

A. Yes sir.

Q. How much money was paid in to the company in cash for the stock that was issued?

A. Nothing that I ever received.

Q. To your knowledge did the water Co. ever receive any money for the stock of the company.

A. Not to my knowledge.

Q. Mr. McLellan, what was the consideration paid by Boody, McLellan & Co. and N. T. Sprague, for the stock held by them and the bonds held by them?

A. I could say that par, dollar for dollar had been paid for the stock and then the bonds were issued, and there was no further consideration.

Q. Mr. McLellan who has the possession of the books of this company?

A. I presume they are at the office of the company here. The stock book is in New York.

Q. Who is the superintendent?

A. Mr. Eldridge.

Q. G. M. Eldridge?

A. Yes sir.

Re-examination by Mr. HENRY NEWBEGIN:

Q. At the time that the bonds now out were issued, who was the president of the Defiance Water Co.?

A. D. A. Boody.

Q. Of the firm of Boody, McLellan & Co.?

A. Yes sir.

Q. So that it was your firm there, one of you being president of the Defiance Water Co. and the other the treasurer, that held the custody of those bonds?

A. Yes sir.

190 Q. And they were distributed by you to the present holders, were they?

A. Yes sir.

Q. Your testimony given on cross-examination in regard to the amount and issue of bonds now out referred to those that were issued at the office of Boody McLellan & Co. in New York city was it not?

(Counsel for the defendant- object to this question.)

A. Yes sir.

Q. Do you know whether or not there has ever been a prior issue of bonds by the water Co. before those that are now out?

A. There was.

Q. State whether or not they were issued before or after the present parties, Boody McLellan & Co. Dennis Long & Co. had control of the Defiance Water Co.?

(Counsel for defendant- object to this question.)

A. They were.

Q. Now at the time of the present issue which you said there was $196,000.00 actually put out, state how, if you know, the old bonds were disposed of?

(Counsel for the defendant- object to this question.)

A. Dennis Long & Co. had $65,000.00 of the old bonds of which I may say the issue was $150,000.00 Boody McLellan & Co. and N. T. Sprague had $85,000.00.

Q. Now state if you know how they were disposed of?

(Counsel for defendant- object to this question.)

A. They were exchanged for this new issue.

Q. What became of them at that time?

A. They were destroyed, and new bonds given for them.

CHARLES W. McLELLAN.

191 And thereupon said GEORGE J. LONG having been duly sworn as aforesaid testified as follows:

Examination of Mr. GEORGE J. LONG by Mr. HENRY NEWBEGIN:

GEORGE J. LONG being first duly sworn testified as follows:

Q. State your name and residence.
A. George J. Long, Louisville, Kentucky.

(Counsel for defendant- object to the testimony of this witness because he does not appear on the notice to take depositions, and the witness now testifying does not appear on the notice.)

Q. State what relation, if any, you now sustain to the Defiance Water Co.

A. I have been acting president in the absence of Mr. Callahan who is pres.

Q. State whether or not as such you have control of the affairs of said company.

A. I have.

Q. State what relation, if any, you sustain, or what interests you have in Dennis, Long & Co.

A. I am president of that company.

Q. Where is that company located where is its principal place of business?

A. Louisville, Ky.

Q. Now you may state, Mr. Long, what if any interest Dennis Long & Co. had in the Defiance Water Co. either for material furnished or otherwise at the time of the failure of S. R. Bullock & Co.

(Counsel for the defendant- object to this question.)

A. Samuel R. Bullock & Co. owed Dennis Long & Co. a little over $49,174.00 at the time of the failure of S. R. Bullock which was for material furnished the Defiance water works.

(Counsel for defendant- object to this answer.)

Q. To go into the construction of the water works?

A. Yes sir.

192 Q. What kind of material was it?

A. Pipes and special castings.

Q. State now if you know, what interest in the Defiance Company you had for material furnished or otherwise for the Defiance Water Co. at the time of the completion of the works and the extension of the mains as they now exist.

(Counsel for defendants- object to this question.)

A. About $36,846.00 in material and money.

Q. Do you mean to be understood that was in addition to the $49,174.00?

(Counsel for defendant- object to this question.)

A. Yes sir.

(Counsel for defendant- object to this answer.)

Q. Now give the total please of the interest you had in the water works at the time of their completion.

(Counsel object to this question.)

A. $86,020.75.

Q. You have heard Mr. McLellan's testimony as to the bonds that were issued being $196,000.00 or $197,000.00 in all. State what, if any of those bonds Dennis, Long & Co. took.

A. $85,000.00 at par value.

(Counsel for defendant- object to this answer.)

Q. How did that amount compare with the actual value of the material that you were to furnish for the water works?

(Counsel for defendant- object to this question.)
(Last question withdrawn.)

Q. In addition to material furnished for the construction of the water works state what if any money and the amount of money they put into the water company.

(Counsel for defendant- object to this question.)

A. I haven't this item separated from the material furnished.

Q. You may give then, if you know, the total amount in
193 actual value of the material that your company put into the water works company and money towards the construction of the works.

A. $86,020.75.

(Counsel for defendant- object to this answer.)

Q. Do you know the total cost of the construction of the works of the Defiance Water Co. down to the time of the final extension of the mains as they now exist?

A. It certainly cost the amount of the bonds outstanding which is at least $196,000.00.

(Counsel for defendant- object to this answer.)

Q. *Is* your company of Dennis Long & Co. have any stock in the Defiance Water Co. and if so, how much?

(Counsel for defendant- object to this question.)

A. $54,600.00 at par value.

Q. What is the value if any, of that stock?

A. It has no value.

(Counsel for defendant- object to this answer.)

Q. Has your company then, anything of value or security from the Defiance Water Co. for the $86,000.00 of its bonds?

(Counsel for defendant- object to this question.)

A. Nothing.

Q. What is the actual cash value of those bonds now if you know?

A. I heard of some of them being sold at forty cents on the dollar.

(Counsel for defendant- object to this question.)

Q. Can't you answer Mr. Long my question as to the actual cash value of those bonds?

A. The actual cash value to us is over par. I think they haven't any value. I have not heard of any sale of these bonds of recent years, excepting the forty cents that some of them were sold at in New York a few weeks ago by auction.

194 Q. What do you mean by their actual cash value to you?

(Counsel for defendant- object to this question.)

A. I mean that we have invested $86,020.75 for which we hold $85,000.00 of these bonds which would mean that we purchased them at over par.

Q. What rate of interest do these bonds bear if you know?

(Counsel for defendant- object to this question.)

A. 6%.

Q. What would the net revenue derived from the water works here at Defiance after payment of all the costs of operation on the $196,000.00 of their cost if all of the rentals under the contract with the city were paid annually?

(Counsel for defendant- object to this question.)

A. Between two and a half and three per cent.

Q. Do you know of a Mr. Miller who used to be connected with the Dennis Long & Co.?

A. Yes I know of him, he is my brother-in-law.

Q. What is his given name?

A. Samuel A. Miller.

Q. From 1887 to 1889 what office if any did he fill with that company?

A. I think he was vice-president, Dennis Long at that time was president of the company.

Q. You may now state whether this Mr. Miller is living or not.

A. He is not, he died in 1895, I think.

A. What office, if any, did Dennis Long hold in the company of Dennis Long & Co. during that time?

A. Dennis Long was president of the company until his death, which was in 1893. He was succeeded by Mr. Miller until his death.

195 Cross-examination by Mr. JNO. P. CAMERON, of counsel for defendant-.

Q. When did you become president of the company of Dennis Long & Co.?

A. I succeeded Mr. Miller in 1895.

Q. And what relation did you sustain to Dennis Long & Co. prior to that time?

A. I was secretary and treasurer.

Q. What relation did you sustain to the company in 1887 to 1889?

A. I was secretary and treasurer.

Q. Were you ever at Defiance during the time that S. R. Bullock & Co. were building these water works?

A. No sir.

Q. You have no personal knowledge then that the material which you furnished S. R. Bullock & Co. went into the water works here or not, have you?

A. Yes, I knew it was shipped here. I don't suppose they ever diverted it.

Q. What was the business of S. R. Bullock & Co.?

A. Water-works manufacturers.

Q. They were at or about the time the water works were built here at Defiance and about the time your company furnished material for them for water-works purposes engaged in building water works at other points in Ohio were they not?

A. I have no recollection of their building at that time in Ohio.

Q. When did they cease doing business at Defiance?

A. In 1888.

Q. When did your company furnish this material to S. R. Bullock & Co.?

A. In 1888.

196 Q. All of it?

A. All to S. R. Bullock & Co. and some in the latter part of 1887.

Q. When did you furnish the money to S. R. Bullock & Co.?

A. We didn't furnish them any money.

Q. To whom did you furnish money?

A. We furnished money to the company after Bullock had dropped out.

Q. How much?

A. In money and material $36,846.15. I cannot tell how much in money and how much in material.

Q. After the failure of S. R. Bullock & Co. your company and others formed the corporation known as the Defiance Water Co. did they not?

A. No sir. The company was organized by S. R. Bullock & Co.

Q. Who was the company of S. R. Bullock & Co.?

A. I don't know.

Q. Your company Dennis Long & Co. were stockholders in the Defiance Water Co. were they not?

A. At that time to the extent of $25,000.00, at the time of the failure of S. R. Bullock & Co.

Q. Did you have any bonds of the Defiance Water Co. at that time?

A. $65,000.00 as collateral security on the indebtedness of Dennis Long & Co. to S. R. Bullock & Co.

Q. These bonds that you then held and this stock was delivered to -- by Bullock & Co. to your firm? Was the stock held as collateral security for the indebtedness of Bullock & Co. to your firm as was the bonds?

A. No sir. It was owned outright by us, having been given by Bullock & Co. as consideration for the pipe contract with him.

197 Q. Then you received the bonds and the stock for the material you had furnished Bullock & Co.

Q. No. We did not, we held the bonds as collateral at that time.

Q. These bonds that you then held were afterwards surrendered up and cancelled and new bonds given to take their places.

A. I think so.

Q. These new bonds were issued and delivered to Dennis Long & Co. Were they not?

A. Yes sir.

Q. And they still hold them?

A. Yes sir. That is we held 85 bonds in all and sold 11, and our present holdings are $74,000.00.

Q. Now if I understand you correctly, the material which your company furnished to S. R. Bullock & Co. was paid for in advance by the stock of Defiance Water Co. and the bonds held by your company as collateral security?

A. The bonds as I stated before were simply held as collateral security and didn't constitute a payment. We would have had to surrender them upon the payment of $49,174.00 The stock was given to Denis Long & Co. in consideration of their making the contract to furnish material to S. R. Bullock & Co.

Q. Mr. Long, who are the present stockholders of the Defiance Water Co.?

A. Dennis Long & Co., Boody McLellan & Co. N. T. Sprague are the principal stockholders. I think there are a few shares held in Defiance besides these parties I just named.

Q. Can you give the names of the Defiance parties holding the stock?

A. Ellis Morrison, 1 share, John Rowe, 10 shares; Peter Kettenring, 10 shares; Boody McLellan & Co. 694 shares; Dennis

198 Long & Co. 546 shares; W. D. Hill, 10 shares; Andrew Sauer 10 shares; G. A. Boody, 2 shares; N. T. Sprague 697 shares; E. N. Lewis, 10 shares; Henry Newbegin 1 share, A. F. Kellahan 8 shares; G. M. Eldridge, 1 share. Total 2,000.

Re-examination by PLAINTIFF'S ATTORNEY:

Q. What security or thing of value whatever has the firm of Dennis Long and Co. for the $86,020.75, in material and cash that they put into the Defiance Water Co. other than the $85,000.00 par value in bonds that you took and the stock that you took, if you know?

(Counsel for defendant- object to this question.)

A. Nothing.

GEO. J. LONG.

Certificate.

THE STATE OF OHIO, } ss:
Defiance County, }

I, Edwin J. Phelps a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named witnesses, Charles W. McLellan and George J. Long, were by me first cautioned and severally sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled suit and carefully examined and that the depositions by them severally subscribed as above set forth were reduced to writing by Don S. Abell, a disinterested person, in my presence and under my direction and after having been read to the said witnesses by me were subscribed by the said witnesses respectively, in my presence and that said depositions were duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached and that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit,

199 In testimony whereof, I have hereunto set my hand and official seal this 6th of February A. D. 1900.

[SEAL.] EDWIN J. PHELPS,
Notary Public.

Cost Bill.

Writing and certifying depositions at 10c. per 100 words	$4.50
Swearing 2 witnesses, 4 cents each.....	.08
Postage and other necessary expenses, (actual cost)	.10
	$4.68

Witness Fees.

Charles W. McLellan	.75
George J. Long	.75
Paid by pl'ff's attorney.....	$1.50
Total cost of taking depositions.....	$6.18

Received of Henry Newbegin, pl'ff's att'y the sum of $4.68 in full of my fees as above specified and also in full of constable's fees. The witness- were paid their fees by pl'ff's att'y.

EDWIN J. PHELPS,
Notary Public.

THE STATE OF OHIO, } ss:
Defiance County, }

Henry Newbegin, being first duly sworn says that on Saturday the 3rd day of February A. D. 1900 he served a true copy of the within notice to take depositions, on Henry B. Harris attorney for The Council of the City of Defiance, defendant at 12 o'clock noon and on the same day at 1.10 p. m. he served a true copy of the said

notice on George T. Farrell, city solicitor and one of the attorneys for the said defendants both of said attorneys having refused to accept service of said notice.

HENRY NEWBEGIN.

Sworn to before me and subscribed in my presence this 6th day of Feb. 1900.

[SEAL.]

EDWIN J. PHELPS,
Notary Public, Defiance Co., Ohio.

200 (Endorsement:) Depositions taken in suit of The Defiance Water Co. *vs.* The City of Defiance and The Council of the City of Defiance. No. 1473. In equity. In the circuit court of the United States N. D. O. western division. Opened by order of court & filed Feb. 7, 1900, Irvin Belford, clerk.

Depositions taken before me and by me sealed up and directed to the said court personally and deposited in the post-office at Defiance, Ohio, by me.

EDWIN J. PHELPS,
Notary Public, Defiance Co., Ohio.

201 *Notice to Take Depositions.*

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Plaintiff,
vs.
THE CITY OF DEFIANCE and THE Council of the City of Defiance, Defendants.
} Case No. 1473. In Equity.

The above-named defendants will take notice that on Saturday the 10th day of February A. D. 1900, the plaintiff above named will take the depositions of G. M. Eldridge, and other sundry witnesses, to be used as evidence in the trial of the above cause, in behalf of the plaintiff at the office of Henry & Robert Newbegin, in the city of Defiance in the county of Defiance in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

Dated this 7th day of February A. D. 1900.

HENRY & ROBERT NEWBEGIN,
Attorneys for said Plaintiff.

Robert Newbegin, being first duly sworn says that on the 7th day of February 1900, he served a true copy of the above notice upon John P. Cameron and George T. Farrell, the attorneys respectively of the said-named defendants.

ROBERT NEWBEGIN.

Sworn to before me and in my presence subscribed this — day of February A. D. 1900.

[SEAL.] EDWIN J. PHELPS,
Notary Public.

202 Caption.

Depositions of G. M. Eldridge, taken before me, Edwin J. Phelps, a notary public within and for the county of Defiance, in the State of Ohio, pursuant to the foregoing notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States, northern district of Ohio, western division, in which The Defiance Water Company is plaintiff and The City of Defiance and The Council of the City of Defiance are defendants; Henry and Robert Newbegin, counsel, being present on behalf of plaintiff, and J. P. Cameron, of the firm of Harris & Cameron, and George T. Farrell, city solicitor, appearing as counsel for the defendants.

G. M. ELDRIDGE of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Counsel for defendants before the taking of these depositions objected and protested to the taking of any testimony at this time in this cause under the notice given herein for that purpose for the reason that there is now a motion pending in this case in the circuit court of the United States for the northern district, western division of Ohio, for the reasons stated and set forth in said motion.

203 Examination *by* Mr. G. M. ELDRIDGE by Mr. HENRY NEWBEGIN:

1 Q. What relation if any, Mr. Eldridge do you sustain to the Defiance Water Co.?

A. I am superintendent of that plant.

2 Q. How long have you been superintendent?

A. Four years.

3 Q. You may state now when the last payment was made to the water Co. by the city of Defiance for any water furnished to it for hydrant rental or other public uses, and how much was then paid?

A. It was the early part of January, 1898. $756.00.

4 Q. When did that accrue and for what period?

A. The amounts were due January 1st, 1898, for service rendered July 1st, to Dec. 31st, 1897. The amounts then due were $3142.50 $756.00 allowed as part payment.

5 Q. And was that $756.00 actually paid to you?

A. Yes sir.

Defendants object to all these questions.

6 Q. State Mr. Eldridge, what monies or payments of any kind, if any, the water Co. has received from the city of Defiance for the use of its water for hydrant rentals and other public purposes since July 1st, 1897, except the $756.00 above stated?

A. There have been no payments made.

7 Q. State now, what the Defiance Water Co. has done towards furnishing all the water for its hydrants rented by the city under its alleged contract with it, and for other public purposes since July 1st, 1897?

Defendants object as defined in section 3 of the city ordinances providing for the re-tal of hydrants etc. from the water Co.?

Defendants object because it is irrelevant and incompetent.

A. We have furnished water to the hydrants connected
204 with our mains which has been used for the extinguishing of fires, flushing sewers and washing streets and gutters.

8 Q. How many hydrants during all that time have been used by the city and at what rate of rental?

Defendants object.

A. There are 161 hydrants in the city for which $40.00 apiece is charged for the 1st 130 and $35.00 each for the remaining thirty-one.

Defendants object to this answer.

9 Q. State, if you can, about the amount of water that has been used in fire practice and flushing sewers and for sanitary purposes and washing gutters and ditches in the streets.

Defendants object.

A. There has been no water used for fire practice and water has been used for sanitary purposes and washing streets and gutters and flushing sewers whenever it has been necessary.

Defendants object to this answer, because it is not responsive *the* the question.

10 Q. The term "deemed necessary" is a little indefinite. Do you know the actual use by the city of water for the above purposes, and if so, whether in large, or small quantities?

Defendants object.

A. They have used the water to my knowledge. The main city sewers are flushed once a year. The volume of water used then is large. The paved streets of the city were washed last summer and the amount then used was large. Clinton street was washed various times during the summer and the amount used was small. Its use for sanitary purposes was at various times. The amount in each case not being excessive.

11 Q. During this time from July 1st, 1897, down to the present time who has had the possession and control of the above 161 hydrants?

A. They have been in the possession and control of the city.

205 12 Q. State whether or not at any time since the city has ceased paying the water Co. its hydrant rentals, through its

council or otherwise it has tendered back the possession of its said hydrants to the company or offered to do so?

Defendants object.

A. It has not.

13 Q. State what, if any accounts for hydrants rentals you have given to the city of otherwise made demand of payment, from them during the above time?

Defendants object.

A. Bills have been rendered the 1st of January and July of each year for the preceding six months' rental. The bills amounted to $3,142.50 each.

Defendants object to this answer.

14 Q. You may state what has been the pressure on the distributing mains during all of that time, since July 1st, 1897?

Defendants object.

A. The pressure has varied from 50 to 65 pounds in general. On only one occasion has it reached forty pounds and that time for only an hour, as shown by the gruge in my office.

15 Q. At that time was there any alarm of fire or call made upon the company to furnish water for fire?

A. No sir.

16 Q. Can you state the date of that time when it went down to forty pounds?

A. The best of my recollection is the 13th or 14th of July 1898.

17 Q. You may now give a detailed statement of what water has been supplied by the Defiance Water Co. to the city and by it used free under section four of its ordinance for public buildings and other purposes named in that section, since July 1st 1897? Give a full detailed statement.

Defendants object.

206 A. We have furnished water to the Central school building, the two wash-basins, two privy holes, yard sprinkling and a fountain having five jets. In the fall of 1899 there were added to the fixtures in this building two full sets of range water-closets, which are furnished with water. We supply water to the city barricks for two sinks, two water-closets and for yard sprinkling. We have supplied water to the cemetary for one large and two small fountains and a number of sprinklers. These are used for drawing water to sprinkle the grass and flowers. We have also supplied the 2nd Ward building with water for one closet, one urinal, and for watering the upstairs room of the hospital. Water was supplied to the 2nd Ward school building for yard sprinkling until the summer of 1898 when there was put in the new building four wash-basins, 2 sets of range water-closets, 11 seats each, one range urinal 8 feet long. We have supplied water to these fixtures since they have

been put in. We have supplied water to the city hall building for two water-closets, one bath-tub and for floor washing, and for watering four horses. We have supplied water to the 3rd Ward building for one water-closet one sink and one urinal. We have supplied water to the 3rd Ward school building for two sets of range water-closets, two wash-basins and for yard sprinkling. We have supplied water for the 4th Ward building for one water-closet, one sink and one urinal. We have supplied water to the 4th Ward school building for two wash-basins, and yard sprinkling. We have also supplied water for three public drinking fountains, one each in the 2nd 3rd, and 4th wards. In these they have a continuous, ready flow of water, for the purpose of watering horses, and cattle and stock of all kinds. We have supplied water to the Baptist church for uses in sink and baptistry. To the Lutheran church for uses for yard sprinkling and privy vaults for school and to operate the motor for the organ. To the English Catholic church water is supplied for the wash-basin, privy vault and yard sprinkling
207 and to operate the motor for the organ.

Defendants object to this answer.

18 Q. State whether or not the water company is still furnishing water as mentioned in your last answer.

Defendants object.

A. Yes, sir.

19 Q. State at whose request if anybody's the additions to the Central school building were made in the fall of 1899?

Defendants object.

A. Nobody's.

20 Q. Who put them in?

Defendants object.

A. The school board.

Defendants object.

Cross-examination by J. P. CAMERON:

1 Q. You are the superintendent of the Defiance Water Co. and have the general management and control of its plant and business in Defiance have you?

A. Yes, sir.

2 Q. When did your superintendency and management begin?

A. January 1st, 1896.

3 Q. And you have continued in that position until the present time?

A. Yes, sir.

4 —. During that period, have you been absent from the city of Defiance?

A. At times, yes.

5 Q. About how frequently?

A. I might say once a year.

6 Q. And how long would you be absent at those times?

A. A week or ten days.

208 7 Q. At each time?

A. Yes, sir.

8 Q. Where is this pressure main *guage* located?

A. The one that I referred to?

9 Q. Yes, sir.

A. In my office.

10 Q. For how long a time does that pressure *guage* indicate the pressure of the water?

A. It is called a continuous recording pressure *guage* which runs without attention for 24 hours.

11 Q. At the end of the 24 hours, there would be a new card or disk required to be put in?

A. The *guage* is like your watch, it will run 36 hours without attention. But at noon each day a strip is taken off of the *guage* and a new one attached.

12 Q. You have no means of knowing the pressure except as indicated by this *guage* to which you refer have you?

A. I have two *guages* in my office, one at the pumping station, we also have access to the *guage* in the city hall building.

13 Q. Where is the water taken from with which the city is supplied?

A. From the Maumee river at a point opposite our pumping station building.

14 Q. This water is muddy the greater part of the year is it not?

Plaintiff object-, irrelevant in cross-examination

A. The water is muddy a portion of the time. I should not say the greater portion.

15 Q. You understand that the Defiance Water Co. was to furnish water to the city which should be good, wholesome water, fit for all domestic uses and manufacturing purposes, do you not?

209 Plaintiff objects as irrelevant and improper on cross-examination, and calls for a conclusion, of the effect of the contract, between the parties.

A. It is so stated in the ordinance.

16 Q. Will you say Mr. Eldridge, as a matter of fact, that the water furnished the city and the inhabitants thereof since the 1st of January 1897, has at all times been good, wholesome water?

Objected to by plaintiff as improper on cross-examination.

A. I will say that it was wholesome, but not clear.

17 Q. Would you say it was fit for all domestic purposes at all times? During the period referred to? That is, from July 1st, 1897 to the present time?

Objection by plaintiff, it is improper on cross-examination.

A. Except for its appearance, I should say yes sir.

18 Q. Would you say that the water so furnished was at all times from July 1st, 1897 to the present time fit for manufacturing uses?

Objected to as improper on cross-examination.

A. Yes sir. It is the same kind of water used by factories who get their water supply from the river.

19 Q. Would you say that this water so furnished by the water works Co. was fit for all domestic purposes during the above time?

Objected to as irrelevant and improper on cross-examination.

A. During a portion of the period mentioned by you I used it in my house for all purposes except drinking.

20 Q. It wasn't fit for drinking purposes was it?

Objected to for reason last stated.

A. The appearance was against it.

21 Q. Will you answer the last question directly by yes or no?

A. Yes sir.

210 22 Q. The water that you used in your own family furnished by the water Co. was filtered was it not?

Objected to by plaintiff.

A. Only the drinking water was filtered.

23 Q. Who filtered it?

Objected to by plaintiff.

A. It was filtered by a filter purchased and owned by me.

24 Q. If it had not been filtered, it would not have been fit even for drinking purposes, would it?

Objection by plaintiff.

A. We had drank it, prior to that time unfiltered.

25 Q. Isn't it true that for a large portion of the year the water furnished by the company was unfit for bathing purposes, that it was muddy?

Objection by plaintiff.

A. I should say it was muddy a portion of the year but not the greater portion, and when muddy it is objected to by some parties for bathing purposes.

26 Q. What portion of the year is it muddy?

Objection by plaintiff.

A. That varies from year to year. Last year I should say three months.

27 Q. How was it the year before?

A. I don't remember.

28 Q. This water so furnished would not be fit unless filtered for cooking purposes, would it?

Plaintiff objects.

A. That is a matter of opinion. I have used it at my house unfiltered.

29 Q. Have you used this water at your house unfiltered, to make tea and coffee?

211 Plaintiff objects.

A. Yes sir.

30 Q. During the time which you say the water is muddy, did you so use it?

Plaintiff objects.

A. We have used it at times when it was muddy. As to the entire period I can't say.

31 Q. The water works Co. have never put in filters have they, in their system of water works here?

Objection by plaintiff.

A. No, sir.

32 Q. If the water works Co. should put in a filtering process, in their system of water works, good, wholesome, water, fit for all purposes of domestic and manufacturing uses could be furnished?

Objected to specially by plaintiff as utterly irrelevant to the issue and wholly improper on cross-examination.

A. If the filter worked properly it would furnish clear water and one practically free from all poisonous germs.

Objection to that answer by plaintiff.

G. M. ELDRIDGE.

212 *Certificate.*

THE STATE OF OHIO, } ss:
Defiance County, }

I, Edwin J. Phelps, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named G. M. Eldridge, was by me first cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth, was reduced to writing by one Don S. Abell, a disinterested person in my presence and under my direction, and after having been read to the witness was subscribed by the said witness in my presence, that said deposition was duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal this 10th of February A. D. 1900.

[SEAL.] EDWIN J. PHELPS,
Notary Public.

Cost Bill.

Writing and certifying depositiong, at 10c. per 100 words.....	$3.00
Swearing witnesses, 4 cents each.....	.04
Postage and other necessary expenses (actual cost).....	.10
	$3.14

Witness Fees.

G. M. Eldridge.....	$ .75
Total cost of taking depositions.....	$3.89

Received of Henry Newbegin, pl'ff's att'y, the sum of $3.14 in full of my fees, as above specified, and also in full of constable's fees. The witnesses were paid their fees by pl'ff's att'y.

EDWIN J. PHELPS,
Notary Public.

213 (Endorsement:) Depositions of G. M. Eldridge, taken in suit of The Defiance Water Co. *vs.* The City of Defiance and The Council of the City of Defiance. No. 1473. In equity. In the circuit ct. of U. S. N. D. O. western division. Filed, Feb. 12, 1900. Irvin Belford, clerk.

This deposition, sealed up, and directed by me to the within-named court and the same has been retained in my possession until deposited by me for transmission in the post-office at Defiance, Ohio.

EDWIN J. PHELPS,
Notary Public.

214 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Plaintiff, *v.* THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance, Defendants.	In Equity. No. 1473. Notice and Stipulation for Taking Depositions on Behalf of Defendants.

The above-named plaintiff, The Defiance Water Company, will take notice that on Monday, the 23rd, day of April, 1900, the defendants above named, The City of Defiance and The Council of the City of Defiance will take the depositions of John Marshall, John J. Malley, John Schneider, Chauncey I. Morse, Daniel F. Krotz, Frank X. Groselle, James H. Shulters, John W. Winn, H. P. Miller, Louis Miller and other sundry witnesses to be used on behalf of said defendants as evidence in the trial of the above cause, at the office of George T. Farrell, attorney-at-law, No. 519 Second street, in the city of Defiance, in the county of Defiance, in the State of Ohio, in said western division of the northern district of Ohio, between the hours of 8 o'clock a. m. and 5 o'clock p. m., and that the taking of the same

will be adjourned from day to day between the same hours until they are completed. Said depositions will — taken before Nathan G. Johnston, Esq., notary public of the State of Ohio, in and for said Defiance county, Ohio.

GEORGE T. FARRELL AND
HARRIS & CAMERON,
Solicitors for Defendants.

Defiance, O., April 19/1901.

Service of the above notice is acknowledged and it is stipulated and agreed that the depositions taken under this notice may be taken in shorthand and transcribed on a typewriter in the presence and under the direction of said notary public by M. E. Kiser, or some other skillful stenographer selected by said notary in the event said M. E. Kiser is unable to take part or all said depositions. Witness our hands this 19th day of April, 1900. Said depositions to be submitted to plaintiff's solicitors after transcribed & before signature by witnesses.

HENRY & ROBERT NEWBEGIN,
Solicitors for Plaintiff.

215 Depositions of sundry witnesses taken before me, N. G. Johnston, notary public in and for Defiance county, in the State of Ohio, on the twenty-third day of April, A. D. 1900, on behalf of defendants in the above-entitled suit, at the office of George T. Farrell, in the city of Defiance, pursuant to and in accordance with the foregoing notice and stipulation.

Present on behalf of the plaintiff, Messrs. Henry and Robert Newbegin, solicitors for plaintiff, and on behalf of the defendants Messrs. George T. Farrell and Henry B. Harris.

(By order of complainant's solicitor, all of the depositions taken under this notice are omitted from this transcript except the following.)

Also came as a witness on behalf of said defendants, E. A. LATTY, who being by me first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth in response to interrogatories propounded to him as hereinafter set forth as follows:

Direct examination by Mr. HARRIS:

Q. 1. * * *
A. * * *

Cross-examination by Mr. ROBERT NEWBEGIN:

Q. 1. In regard to the resolution passed, I think you said December 9th, 1895, by which the whole of the water company's bill except $500.00 was paid or was allowed to be paid the reason for the peculiar language of that resolution was to save the city's rights in defending

the claim of $500.00 for hydrant rental deducted on account of certain fires, was it not?

A. The resolution of January 7th, 1896 paid all of the water company's rental for the preceding six months, the deduction of
216 $500 was made by the resolution of December 9th, 1895, and the language in the resolution of January 7th, was for the purpose of protecting the city's rights regarding the deduction of $500.

Q. 2. In other words, Mr. Latty, the council found no fault with the rates furnished the city for hydrant rental, did it?

A. I think the city regarded the rate for hydrant rental to be a reasonable one, but however the gross sum paid was objected to because of a large number of hydrants which they thought unnecessarily close together.

Q. 3. Then, Mr. Latty, when you testified that there had been frequent objections in the council to the rates charged for water you referred to the rate charged private consumers, did you not?

A. Yes, sir.

Q. 4. Mr. Latty, was the resolution of December 9th, 1895, in which the $500 was deducted initiated by the finance committee of the council?

A. I so understood at the time.

Q. 5. Who composed the finance committee at that date?

A. I must refresh my mind by looking at the records. (Examines records.) *A.* Messrs. Diehl, Hatry and A. Krotz.

Q. 6. And at the time the probate judge allowed the injunction of January 4th, 1898, who composed the finance committee at that time.

Q. Messrs. Diehl, Harris and D. F. Krotz.

Q. 7. Were they all the members of the committee.

A. They were all the members.

Q. 8. Did they join in the proceedings for partial allowance of the company's bill as entered on that date?

Question objected to as now proper cross-examination.

A. I will look that up. I don't know whether they were all present. I believe they did.

Answer objected to by counsel for defendant-.

Q. 9. You say, Mr. Latty, that the arrangement paying the $756.00 on January 4th, 1898 was made after you had reached the council chamber to be ready for the regular meeting?

217 A. Entirely so. It was done at the suggestion of Mr. Eldrige and I had no knowledge that he would make any such request before that.

Q. 10. You prepared a journal entry embodying the alteration in the temporary restraining order, did you?

A. I think I did.

Q. 11. Was that journal entry journalized?

A. I don't remember. Quite likely not as it was an amicable arrangement at the time.

Q. 12. It was "O. K'd" by the probate judge?

A. I don't remember that. When I stated that a journal entry was prepared I may possible have been mistaken. My best recollection was that the modification was made by the judge in some such manner.

Q. 13. The character of the water furnished depends upon the state of river from which the supply is taken don't it?

A. Yes sir.

Q. 14. This state of affairs has existed continuously ever since the plant was installed and did exist before that time?

A. Yes, I presume the water in the river is to large extent the same nature as it was before in regard to its purity.

Q. 15. And anybody at the time the plant was installed could have told what the character of the river water was, could they not?

Question objected to by counsel for defendants, as not proper cross-examination and not material.

A. I think so.

I want to add to my answer to question No. 9 in direct examination, the following:

"And also for the purpose of protecting the city's interest from any claim of estoppel by reason of further payments, it having come to my knowledge shortly previous thereto that there was some question as to the validity of the alleged franchise contract."

EDWIN A. LATTY.

* * * * * * *

218 Thereupon came also as a witness on behalf of the defendant-, JOHN J. MALLEY, who being by me first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth in the above-entitled case in answer to interrogatories propounded to him as hereinafter set forth, testified as follows:—

Direct examination by Mr. HARRIS:

Q. 1. * * *

A. * * *

Q. 45. You may state whether or not the question of issuing and selling bonds of said city of Defiance in the sum of $75,000 to provide means for the payment of the costs and expenses of the erection or purchasing of a water-works system for the city of Defiance was ever submitted to the voters of said city?

Question objected to as irrelevant and immaterial.

A. The question was submitted to the voters.

* * * * * * *

Cross-examination by Mr. NEWBEGIN:

Q. 1. * * *

A. * * *

Q. 7. Referring to the journal you may state what the resolution

and the vote provided for in that resolution was and where it is found on the journal?

A. On page 535 *on* Journal "C," proceedings of the city council, the canvass of the vote appears at the election of April 1896, and the vote cast on the question of water works as appears here was: Yes 1111, No, 409.

Q. 8. The votes indicated as yes being in favor of the ownership of a plant by the city and a bond for the city to procure
219 such?

A. Yes, I take it that way.

* * * * * * *

J. J. MALLEY.

EXHIBIT "K."

Be it resolved by the city council of the city of Defiance, Ohio, as follows:—

That the water committee be instructed to investigate the probable costs of water works, sufficient to supply the city with clear water, and further the number of consumers of water now supplied and the approximate gross income received from the use of water, and the price, demands for use of water at present time as compared with prices prevailing one year ago, and also, prices charged in other cities for similar service and to report at the earliest opportunity.

Done at the council chamber, this 12th day of March, A. D. 1897.

W. KNISS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote: Ayes—Coy, Diehl, Duerk, Hatry, Kingsbury, Kniss, Shulters,—7.

Exhibit "K," N. G. Johnston, N. P. (Seal.)

220 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY, Complainant,
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance, Defendants.
} No. 1473. In Equity.

I, Nathan G. Johnson, a notary public of the State of Ohio, in and for the county of Defiance, do hereby certify, that, the above witnesses, viz:— * * * E. A. Latty, * * * John J. Malley * * * all of lawful age and of sound mind, were each and all by me first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth in the above-entitled suit; and that said depositions pursuant to the notice and agreement of counsel herein hereto attached were all taken in

shorthand in my presence by Miss Mollie E. Kiser, a competent stenographer and a disinterested person and when transcribed were read over to said respective witnesses by me in the presence of counsel for both parties, and after the transcribed testimony had been submitted to and examined by counsel *by* the plaintiff said depositions were subscribed by said respective witnesses, in my presence and in the presence of counsel for both parties.

That said depositions were taken at the office of George T. Farrell, No. 519 Second street, in the city of Defiance, Ohio, beginning on the 23rd day of April, 1900, and continuing from day to day between the hours specified in the notice as in the deposition particularly set forth and concluded on Friday, the 4th day of May, 1900; that the said several exhibits recited or referred to in the depositions of witnesses were offered and received in evidence and marked and identified by me as specifically noted in the foregoing depositions, (* * * .) That I am not counsel or relative of either party or otherwise interested in this suit.

221 In testimony whereof I have hereunto set my hand and official seal this 8th day of May, 1900, at the said city of Defiance, in said northern district of Ohio, western division.

[SEAL.] N. G. JOHNSTON,
Notary Public.

Filed May 8, 1900.

IRVIN BELFORD, *Clerk.*

222 *Notice to Take Depositions.*

STATE OF OHIO, *Defiance County,* } *ss:*

THE DEFIANCE WATER COMPANY, Plaintiff, *vs.* THE CITY OF DEFIANCE and THE Council of the City of Defiance, Defendants. } In Equity. Case No. 1743, Pending in the Circuit Court of the United States for the Northern District of Ohio, Western Division.

The above-named defendants will take notice, that on Monday the 16 day of April, A. D. 1900, the plaintiff above named will take the depositions of W. A. Kehnast, Edwin A. Latty, Henry Newbegin, and other sundry witnesses, to be used as evidence in the trial of the above cause, in behalf of the plaintiff, at the office of Henry & Robert Newbegin, in the city of Defiance, in the county of Defiance in the State of Ohio, between the hours of nine o'clock a. m., and nine o'clock p. m., of said day, and that the taking of the same will be adjourned from day to day, between the same hours until they are completed.

HENRY & ROBERT NEWBEGIN,
Attorneys for said Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived.

Done this 12th day of April, A. D. 1900,

HARRIS & CAMERON, *Att'ys, and*
GEO. T. FARRELL,
Attorney for Defendants.

Caption.

Depositions of sundry witnesses taken before me, N. G. Johnston, a notary public within and for the county of Defiance, in the State of Ohio, pursuant to the annexed notice and order of the court, and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States for the northern district of Ohio, western
223 division, in which The Defiance Water Company is plaintiff and The City of Defiance and The Council of the City of Defiance are defendants, Henry and Robert Newbegin, attorneys, being present on behalf of plaintiff and H. B. Harris and Geo. T. Farrell on behalf of defendants.

(The deposition of James B. Tennyson, is omitted from this transcript by order of complainant's counsel.)

EDWIN A. LATTY, being first duly cautioned and sworn testifies as follows:

1. You were city solicitor here at one time?

A. Yes, sir. I was the duly elected qualified and acting city solicitor of the city of Defiance, Ohio, from the early part of April 1894, to the early part of April, 1898.

2. And as such was it you who brought the suit of The City of Defiance, by Edwin A. Latty, city solicitor, against The City Council of the City and The Defiance Water Company, on or about Jan'y 4th, 1898, in the court of common pleas of Defiance county, Ohio, to restrain the city council from paying the water company its bill for hydrant rentals that had accrued for 6 months prior to 1898?

A. Yes sir.

3rd. State now what knowledge if any the city council or any of its members had of your intention to bring that suit prior to the time or at the time it was brought?

Question objected to as immaterial and irrelevant, by defendant.

A. Prior to the commencement of that suit I had discussed the matter and the probability of my bringing it with one member of the council whom I regarded as co-operating with me what I deemed to be to the best interest of the city and perhaps with another member but not fully; this conversation took place very shortly before the commencement of the action.

224 4. You think then that so far as you were concerned you had talked with not more than 2 members about it?

A. That is my best recollection.

5. After that suit was brought how long time was it that you continued to prosecute it before you retired as an attorney for the prosecution from the case?

A. My connection with that suit ceased entirely upon the ending of my term of office in April 1898.

Cross-examination:

1. Mr. Latty was the suit just referred to by you commenced by you of your own volition?

A. Entirely so.

2nd. At the time that you talked with one or possibly two, of the members of the council, as you have stated in your examination that you did had you made up your mind and determined to bring such a suit?

A. I think I had.

3rd. Is it a fact that the members of the city council procured you to bring this suit against them and that you entered into such an arrangement with them or any of them, and accordingly brought the suit through their procurement?

A. No sir.

Rebuttal:

1. You did however consult or talk with these 2 men you spoke of about the advisability of bringing it?

Question objected to as assuming fact not proven as leading and suggesting, by counsel for defendants.

A. With regard to the advisability of bringing the suit I do not think I had any conversation with them.

2. State if you can remember the conversation as it actually took place between you and these members, and if you cannot give the whole of it give the substance of it.

A. I had several conversations with Mr. Krotz, since deceased, who was then a member of the council and who I believe took the same view of the city's rights and premises which I had.

225 The substance of my conversation with him regarding the matter was that I had discovered that the contract between the city, and the water company, lacked certain steps which I believed to be essential to its validity and that I was determined as such city solicitor to prevent any further payments by the city to the water company under said contract. As to the conversation with the other members of the council I do not know that it went any further than simply notifying them of my intention to bring the action. This was Mr. Coy.

3. State now of what committee or committees of the city council Krotz and Coy were members if you know at that time?

A. I believe they were then members of the finance committee of said council.

4. And it was the finance committee of the council that approved all of the bills for payment before they were allowed, was it not?

Objected to as leading and suggested by defense.

A. Generally.

5. State whether or not the accrued bill of this water company for the 6 months prior to the 1st of Jan'y 1898 in question in the order in which the council did its business would or would not be referred to this finance committee prior to payment?

Objection to by counsel for defence.

A. Yes sir they would.

Witness here requests to add to the above testimony the following: That my conversation with Mr. Krotz, may have taken place possibly 3 months or so prior to the commencement of the suit, with other consultations up to some time a short time before the suit.

EDWIN A. LATTY.

(The deposition- of W. A. Kehnast, and Louis Spring are omitted from this transcript by order of complainant's counsel.)

226 *Certificate.*

THE STATE OF OHIO, } ss:
Defiance County, }

I, N. G. Johnston, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that James B. Tennison, Edwin A. Latty, W. A. Kehnast and Louis Spring witnesses deposing hereinbefore were by me first severally sworn and cautioned to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them severally subscribed as above set forth, were reduced to writing by Miss Jennie Mackley, by consent of parties & a person disinterested in the suit & the results, in my presence & in the presence of each of said witnesses and after having been read over by said witnesses were subscribed by the said witnesses respectively, in my presence, and that said depositions were duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit, and was at the time of so taking the said deposition- a notary public within and for said county of Defiance, Ohio.

In testimony whereof, I have hereunto set my hand and official seal, this 16 of April, A. D. 1900.

[SEAL.]

N. G. JOHNSTON,
Notary Public.

(Endorsement:) Case # 1473. Pending in equity in the circuit court of the United States for the northern district of Ohio, western division. Title, The Defiance Water Co., plaintiff, *vs.* The City of Defiance & The Council of the City of Defiance, defendants. Depositions taken on behalf of plaintiff before N. G. Johns-on, notary public. N. G. Johnston, notary public. These

depositions were taken before me and retained in my possession & sealed up and by me directed to the clerk of the court. N. G. Johnston, notary public. Filed and opened by order of the court, April 18, 1900, Irvin Belford, clerk.

227 *Copies of Records of the Council of the City of Defiance, Ohio.*

B, page 33 ff.

Proceedings of the City Council upon Passage of the Water-works Ordinance.

Adjourned meeting, city hall council chamber.

DEFIANCE, O., *Aug.* 17, 1887.

President Miller called the council to order. Members present Bonn, Kehnast, Marshall, Miller, Otto, and Zigler (6).

Mr. Enos, acting city solicitor presented the revised water-works ordinance as follows:

(Here follows ordinance spread on records in full.)

On motion the rules *was* suspended for the purpose of putting the above ordinance upon its final passage by the following vote Bonn, Kehnast, Marshall, Miller, Otto, and Zigler (6)

Being then put upon its final passage the foregoing ordinance was adopted by the same note.

Passed Aug. 17th, 1887.

Attest: JAS. A. KETCHEL, *City Clerk.*

I do hereby certify that the foregoing ordinance has received legal publication in the Defiance Democrat a paper of general circulation in said city and county.

JAS. A. KETCHEL, *City Clerk.*

There being no further business on motion council adjourned.

JAS. A. KETCHEL, *City Clerk.*

228 I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of the entire record of said adjourned meeting of the city council held August 17th, 1887, excepting said ordinance therein set forth entitled "An ordinance to authorize and provide for the construction and maintainance of a system of water works in the city of Defiance, Defiance county, Ohio" and is taken from the records of the said city of Defiance, Ohio.

J. J. MALLEY, *City Clerk.* [SEAL.]

Defiance, Ohio, April 10, 1900.

Transfer of Franchise from Bullock & Co. to the Defiance Water Company; Certificate of Commencement of Work.

"Mr. Samuel R. Bullock and Company (the contractors for the proposed water works of this city) presented their papers of transfer of franchise to the Defiance Water Works Company which was read. They also asked that a certificate be given them showing that they had commenced the work on said proposed water works in accordance with section 7 of the water-works ordinance passed August 17th, 1887 by the council of the city of Defiance, Ohio.

There being no objections the clerk was instructed to issue the certificate asked for by said company under the city clerk's seal."

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records of the city council thereof, do hereby certify that the above and foregoing is a true copy of so much of the records of the regular meeting of said council had on the 7th day of February A. D. 1888, as affect the Defiance Water Company, and is taken from the records of the said city of Defiance, Ohio.

J. J. MALLEY, *City Clerk.* [SEAL.]

Defiance, Ohio, March 31, 1900.

229 B, 144.

A resolution to extend the water mains on Water street, in third ward.

Be it resolved by the council of the city of Defiance, Ohio That the water works company be and they are requested and authorized to extend the mains on Water street in the third ward of said city easterly from the intersection of Pearl street a distance of two hundred feet in consideration that said city will pay for the expense of said extension the sum of fifty dollars and no more, at the first annual payment, provided always that said city shall not be required to take any additional fire-hydrant or part thereof by reason of such extension.

Done at the council chamber this 7th day of August, 1888.

On motion foregoing resolution was placed on its final passage and adopted by ayes, Dohoney, Hahn, Miller, Marshall, Sauer, Tennyson, Vincent and Zigler,—8.

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records of the city council thereof, do hereby certify that the above and foregoing resolution is a true copy of a resolution passed as aforesaid and taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

Report of Water-works Committee.

"To the city council of Defiance, O.:

Your committee to whom was referred matter of locating water pipes have found it advisable to change the water mains in
230 the third ward, and instead of extending it past the college (Defiance) we recommend that it turn at the southwest corner of the college grounds and go thence west to Nichols street, thence south on Nichols street to the Brunersburg road with one fire-hydrant on Nichols street about opposite lot 3 on Gibson's addition to North Defiance and one about opposite lot 59 of Holgate's addition to North Defiance.

Respectfully submitted,

A. B. VINCENT,
THOS. DOHONEY,
Committee.

On motion foregoing report adopted unanimously."

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records of the city council thereof, do hereby certify that the above and foregoing report is a true copy of a report adopted as aforesaid at the regular meeting of the council September 18th, 1888, and taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31 1900.

Time Fixed for Making Test.

"Mr. Morrison chief engineer of the water works was present and announced that the works were now complete and asked the council to appoint the day and hour for making the test as provided in the ordinance on the subject.

On motion Monday, one o'clock p. m. January 21st, was fixed upon as the time to make the test."

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records of the city council thereof do hereby certify that the above and foregoing is a true copy of so much of the records of the regular meeting of said council held on the 15th day of
231 January 1889, as affects the Defiance Water Company, and is taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

A resolution to lay additional water mains and contract for 3 extra fire-hydrants in the 3rd ward.

Be it resolved by the city council of the city of Defiance, Ohio, That it is necessary for the protection of the citizens of the 3rd ward from fire, that 1990 feet of 4-inch mains are hereby ordered laid, and

the city hereby contracts for 3 additional fire-hydrants, rent of said hydrants to commence when same can be used for fire protection, said work of laying pipe to be commenced as soon as the weather will permit. It is hereby ordered that M. B. Gorman, city clerk arrange with the Defiance Water Co. in accordance with this resolution.

On motion the foregoing resolution was placed upon its final passage and adopted by ayes Dohoney, Hahn, Miller, Marshall, Sauer, Tennyson, Smith and Zigler.

I, J. J. Malley, clerk of the city of Defiance, Ohio and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of a resolution adopted as aforesaid at the regular meeting of the said council held on the 19th day of February 1889, taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

232 *A Report.*

To the city council.

GENTLEMEN: In the matter of extending the water mains on Wayne street we the committee find that as a protection in case of fire it is necessary and recommended the laying of pipe from the intersection of Wayne and Arabella streets south on Wayne street to the south line of B. & O. track the water company to put in only one hydrant in construction. This order to be issued by the clerk on the payment to him — the sum of thirty dollars by the property-owners.

CHRIST DIEHL,
Chairman Water Committee.

On motion the report was adopted.

The following resolution was introduced and adopted by ayes Dohoney, Deihl, Hahn, Sauer, Smith, Tennyson, and Zigler.

A resolution to extend water mains on Wayne street.

Be it resolved by the council of the city of Defiance, Ohio, That the water mains be extended on Wayne street from Arabella street to the south line of the B. & O. railway, on condition that the city shall be required to pay for but one hydrant, said hydrant to be located at the south end of said extension, the city clerk is hereby directed to notify the water company of the passage of this resolution, when the property-owners shall have paid him towards the rental of said hydrant the sum of thirty dollars.

This resolution shall take effect on the giving of such notice by the clerk.

Done at the council chamber this 18th day of June 1889.

J. B. TENNYSON,
President pro Tem.

Attest: M. B. GORMAN, *City Clerk.*

233 I, J. J. Malley, city clerk of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing are true copies respectively of a report and a resolution adopted and passed as aforesaid at a regular meeting of the said council June 18th, 1889, taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

Resolution.

The following resolution was introduced, read and adopted by ayes: Dohoney, Diehl, Hahn, Hill, Sauer, Smith and Zigler, 7.

A resolution instructing the Defiance Water Company to connect their water pipes on Clinton Street extension and Perry street by placing an 8-inch pipe between the present terminals and under the W. & E. canal at Deatrick street.

Be it resolved by the city council of the city of Defiance, Ohio, That the Defiance Water Company be instructed and they hereby are, to connect their water pipes on Perry street and Clinton Street extension at their southern end by laying an eight-inch pipe along Deatrick street and under the Wabash and Erie canal, as is platted on the water-works plat of this city and that same shall be finished within sixty days.

Passed July 2nd, '89.

Attest: M. B. GORMAN, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above is a true copy of a resolution passed as aforesaid by the said council and taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

234 The following resolution was introduced, read and adopted by ayes: Crandall, Ewigleben, Hahn, Sauer, Southworth, Squire, and Tennyson, 7.

A resolution.

Be it resolved *gy* the council of the city of Defiance, Ohio, That a public drinking fountain with openings for man and beast be erected and maintained at the junction of Holgate pike and the Brunersburg road, in the third ward of said city, as one of the *the* fountains to be supplied with water free of charge by the Defiance Water Company, in accordance with the ordinance for water works and that the water committee be and it hereby is instructed to carry this resolution into effect.

J. B. TENNYSON,
President of Council.

Attest: M. B. GORMAN, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio and custodian of the records thereof, do hereby certify that the above and foregoing resolution is a true copy of a resolution adopted as aforesaid at a regular meeting of the said council held January 5th, 1892.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

A resolution to extend water service on Wayne street south from Arabella street.

Be it resolved by the city council of the city of Defiance, as follows:—

That the water service on Wayne street in said city be extended south from the south line of Arabella street on the east side of the said Wayne street to the alley immediately south of the residence of Harvey Powel and there to terminate. That one fire-hy-
235 drant be placed on the southwest corner of Wayne and Seminary streets and one at the intersection of Wayne street with said alley and that the city clerk be directed to give notice to the Defiance Water Company to carry this resolution into effect.

Done at the council chamber this 17th day of May A. D. 1892.

EDWARD SQUIRE, *President.*

Attest: J. J. MALLEY, *City Clerk.*

A resolution to extend the water service on Washington street.

Be it resolved by the city council of the city of Defiance, O. as follows, That the water service on Washington street be extended from Hopkins street northward, on the west side of the said Washington street to the northwestern corner of Fourth and Washington streets and there to terminate. And that one fire-hydrant be placed at the intersection of said streets. And that the city clerk be directed to notify the Defiance Water Company to carry this resolution into effect.

Done at the council chamber this 17th day of May A. D. 1892.

EDWARD SQUIRE, *President.*

Attest: J. J. MALLEY, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing are true copies of resolutions respectively adopted as aforesaid at the regular meeting of the said council held May 17th 1892, and are taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio; March 31, 1900.

236 A resolution to extend water service in said city as therein provided.

Be it resolved by the city council of the city of Defiance Ohio, That the water service in said city be extended along the east

side of Harding street from its intersection with High street to the intersection of Pleasant street, with a hydrant or fire-plug at said intersection of Harding and Pleasant streets. And that the water committee be and said committee hereby is directed to cause this resolution to be carried into immediate effect.

Done at the council chamber this 26th day of Sept. 1892.

EDWARD SQUIRE,
President of Council.

Attest: J. J. MALLEY, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of a resolution adopted as aforesaid and taken from the records of said city of Defiance, Ohio.

[SEAL.] I. J. J. MALLEY, *City Clerk.*

Defiance Ohio March 31, 1900.

A resolution to place a fire plug or hydrant on the southwest corner of Harding and Charles streets.

Be it resolved by the city council of the city of Defiance, O. as follows:

That an additional fire plug or hydrant be placed on the southwest corner of Harding and Charles streets, and that the water com. be and it *it* hereby is directed to carry this resolution into effect.

237 Done at the council chamber this 5th day of July, A. D. '93.

JAS. F. CRANDALL, *President.*

Attest: J. J. MALLEY, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of a resolution adopted as aforesaid and taken from the records of the said city of Defiance Ohio.

J. J. MALLEY, *City Clerk.* [SEAL.]

Defiance, Ohio, March 31, 1900.

A resolution to extend water main and to provide for a new hydrant.

Be it resolved by the city council of the city of Defiance, as follows:—

That the Defiance Water Company is hereby notified and directed to make an extension, to be made on and along Columbus avenue in said city for a length of 500 feet easterly from the intersection of the same with Ayersville road and to place a hydrant at the easterly end of such extension, as provided for in an ordinance passed at said council August 17th A. D. 1887.

Done at the council chamber this 18th day of Sept. A. D. 1894.

J. B. TENNYSON, *President.*

Attest: J. J. MALLEY, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of a resolution passed as aforesaid by the said council taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

238 *Inquiry as to Defence of Solicitor's Suit.*

Injunction proceedings — water Co.

Mr. Newbegin was present as the attorney for the water Co. and asked who the council proposed to employ as its attorney in the injunction proceedings against the city. The question was allowed to go unanswered.

I, J. J. Malley, clerk of the city of Defiance, Ohio and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of the record of so much of the proceedings of the city council at its regular meeting January 18th, 1898, as affects the Defiance Water Company, and is taken from the records of the said city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 17, 1900.

Resolution employing attorneys on the water-works case.

Be it resolved by the council of the city of Defiance O. That Harris and Cameron, be and they are hereby retained and employed as attorneys on behalf of the council of said city in the case of The City of Defiance O. by Edwin A. Latty its solicitor against The Council of the City of Defiance, Ohio, and The Defiance Water Company and said Harris and Cameron are to be paid a reasonable compensation for their services.

Passed May 3rd 1898.

CHAS. HARRIS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

239 I, J. J. Malley, clerk of the city of Defiance, Ohio and custodian of the records thereof do hereby certify that the above and foregoing is a true copy of a resolution passed by the said council as aforesaid, taken from the records of the said city Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance, Ohio, March 31, 1900.

(Endorsement:) No. 1473. In equity. U. S. cir. court, N. D. O. Toledo. Defiance Water Co. *vs.* City of Defiance, *et al.* Transcripts from records of the city council of Defiance filed by plaintiff for use in evidence. Filed, April 18, 1900, Irvin Belford, clerk. Henry & Robert Newbegin, attorneys-at-law, Defiance, Ohio, pl'ff's solicitors.

240 *Notice to Take Depositions.*

THE DEFIANCE WATER COMPANY, Plaintiff, *vs.* THE CITY OF DEFIANCE & THE Council of the City of Defiance, Defendants.	Case No. 1473, Pending in the Circuit Court of the United States, Northern Dis. of Ohio, Western Division. In Equity.

The above-named defendants will take notice that on Saturday, the 21st day of April, A. D. 1900 the plaintiff above named will take the depositions of sundry witnesses, to be used as evidence in the trial of the above cause, in behalf of the plaintiff at the office of Henry & Robert Newbegin, in the city of Defiance, in the county of Defiance, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m., of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

HENRY & ROBERT NEWBEGIN,
Attorneys for Plaintiff.

Dated April 19, 1900.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said deposition may be taken is by agreement waived.

Done this 19th day of April A. D. 1900.

HARRIS & CAMERON &
GEORGE T. FARRELL,
Attorneys for Defendants.

241 Caption.

Depositions of Henry Newbegin, a witness, taken before me, Dey Ayers, a notary public within and for the county of Defiance, in the State of Ohio, pursuant to the annexed notice, and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States, northern district of Ohio, western division, in which The Defiance Water Company is plaintiff and The City of Defiance and The Council of the City of Defiance are defendants, Robert Newbegin being present on behalf of plaintiff and Henry B. Harris on behalf of defendants.

HENRY NEWBEGIN of lawful age, being by me first duly cautioned and sworn deposes and says as follows in narrative form:

As counsel for the Defiance Water Company I had the entire defense of that company in the suit of The City of Defiance by Edwin A. Latty its city solicitor against The Council of the City of Defiance, Ohio and The Defiance Water Company, being case No. 6841 from its commencement until its final decision in the court of common pleas of Defiance county, State of Ohio, and on appeal by the City

of Defiance to the circuit court of said county I also had the entire defense of the said Defiance Water Company in the said circuit court.

From the beginning of said suit in the court of common pleas to this date no one has appeared, orally, or otherwise to make or has made, and defense to said suit in either of said courts for the other defendant The Council of the City of Defiance.

HENRY NEWBEGIN.

242 *Certificate.*

THE STATE OF OHIO, } ss:
Defiance County, }

I, Dey Ayers, a notary public in and for the county and State above named duly commissioned and qualified do hereby certify that the above-named Henry Newbegin was by me first sworn and cautioned to testify the truth, the whole truth and nothing but the truth and that the deposition by him subscribed as above set forth was reduced to writing by me, and after having been read to said witness was subscribed by the said witness in my presence, that said deposition was duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit, and was at the time of so taking the said deposition a notary public duly qualified.

In testimony whereof, I have hereunto set my hand and official seal this 21st day of April, A. D. 1900.

[SEAL.] DEY AYERS,
Notary Public within and for Defiance County, Ohio.

(Endorsement:) The Defiance Water Company *vs.* The City of Defiance *et al.* No. 1473. Depositions. Depositions taken before me and held in my possession until by me signed and sealed and transmitted to the clerk of said cou-ty, Dey Ayers, notary public. Opened by order of court & filed Apr. 23, 1900 Irvin Belford clerk.

243 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY } In Equity. No. 1473.
vs.
THE CITY OF DEFIANCE ET AL. }

Certified copies of the records of certain proceedings of the city council of Defiance, Ohio, filed in evidence in the above cause on behalf of the plaintiff.

Resolution to Investigate Water Company's Standing.

Be it resolved by the council of the city of Defiance, O., as follows: That the water committee of the council of the city of Defiance, O.,

and the city solicitor of said city be and are hereby directed to forthwith investigate the standing of the Defiance Water Co. in the said city of Defiance with a view to ascertain and report on the following propositions.

1st. Has the Defiance Water Co. a legal franchise in the city of Defiance?

2nd. If so can the city of Defiance be compelled to pay for fire-hydrants other or more than one for each 500 feet of main?

Done at the council chamber this 2nd day of February 1896.

W. KNISS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:

Ayes: Coy, Duerk, Hatry, Kniss, Krotz, Shelters 6.

244 I, J. J. Malley city clerk of Defiance Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of a resolution adopted as aforesaid at a regular meeting of the city council of the city of Defiance held on the 2nd day of February, 1897, and taken from the records of the said city Journal D. page 8.

[SEAL.] J. J. MALLEY, *City Clerk.*

Defiance Ohio, May 17th, 1900.

Report of the Water Committee and City Solicitor.

To the hon. members of the city council of Defiance, O.:

The undersigned to whom was referred the standing of the Defiance Water Co. with a view to ascertain and report on the following propositions.

1st. Has the Defiance Water Company a legal franchise in the city of Defiance?

2nd. If so, can the city of Defiance be compelled to pay for fire-hydrants other or more than one for each 500 ft. of main?

beg leave to report that we have examined the standing as to having a legal franchise and find that under and by virtue of section 2434, such a contract as the water company claims to have, must have been ratified by a vote of the electors of the city which as is well known, was not done.

If it be suggested that this power has been conferred by an act passed May 12th, 1886 it is submitted that the true construction of this act, is not to repeal the act first mentioned but to provide a limitation to the term of such franchise to twenty years as
245 the section named is not repealed expressly nor by necessary implication. From an examination of numerous authorities bearing upon this question we come to the conclusion that the Defiance Water Co. has no legal franchise with the city. As this has been made a defense to the suit of this company, the city solicitor

has made an industrious and valuable search of all authorities relating to such franchises, and the conclusions reached are believed to be well founded.

This necessarily disposes of the 2nd proposition without further consideration.

Respectfully submitted.

B. B. KINGSBURY,
A. KROTZ,
JOHN DUERK,
Water Com.

I, J. J. Malley, city clerk of the city of Defiance, Ohio and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of said report as recorded in the records of the regular meeting of the said council held on the 16th day of February, A. D. 1897, and taken from the records of said city, Journal D, page 11.

Defiance, Ohio May 17th 1900.

J. J. MALLEY,
City Clerk. [SEAL.]

Resolution of the Water Committee on Franchise for the Water Co.

Be it resolved by the council of the city of Defiance O. as follows: That the water committee of the city council be and are hereby directed to prepare and submit at the next meeting of the city council, an ordinance granting the Defiance Water Co. a franchise. The said ordinance granting said franchise to fix the number of fire-hydrants and their location, the price per annum for each hydrant, also to schedule the price of water which may be charged
246 private consumers in their divers and several methods and wants. And the city solicitor on behalf of and in the name of the city of Defiance is hereby instructed to apply to any court of competent jurisdiction, if necessary, for a restraining order to prevent the said Defiance Water Company from shutting off the water supply from either the city fire-hydrants of the city of Defiance, or of any individual consumer who is willing to and does make legal consumer (sic) of water rent as charged previous to January 1st, 1897.

Pending the passage and acceptance of the ordinance granting the franchise as above set forth.

Done at the council chamber this 18th day of February A. D. 1897.

W. KNISS, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote:

Ayes: Coy, Diehl, Duerk, Hatry, Kniss, Krotz, Schulters,—7.

I, J. J. Malley, city clerk of the city of Defiance, Ohio, and custodian of the records thereof, do hereby certify that the above and foregoing is a true copy of a resolution passed as aforesaid and taken from the records of the regular meeting of the said city council of February 18th, 1897, page 13, Journal D of the records of the city of Defiance.

J. J. MALLEY,
City Clerk. [SEAL.]

Defiance Ohio, May 17th, 1900.

(Endorsement:) In equity No. 1473. In the U. S. cir. ct. N. D. O. W. D. The Defiance Water Company against The City of Defiance *et al.* Copies of records of city council. Filed as evidence in the suit. Filed May 21, 1900. Irvin Belford, clerk. Henry and Robert Newbegin, Defiance Ohio.

247 In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants. } No. 247.

Transcript of the Pleadings, Orders, and Proceedings.

248 THE STATE OF OHIO, *Defiance County,* } *ss:*

Court of Common Pleas.

THE CITY OF DEFIANCE, OHIO, by Edwin A. Latty, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendants. } Case No. 6841. Petition. (Filed Jan'y 4", 1898.)

The said Edwin A. Latty, avers and says, that said plaintiff, The City of Defiance, Ohio, is a municipal corporation duly organized and existing under the laws of the State of Ohio, as a city of the fourth grade of the second class, and that he is the duly elected, qualified and acting city solicitor of said city, and as such officer bring- this action in the name of said city, under the provisions of section 1777 and other section- of the statutes of said State, and that the said defendant The Defiance Water Company is a corporation incorporated under the laws of said State.

Said city solicitor further says that on the 17th day of August, 1887, said city of Defiance, Ohio, by its council attempted to enter into a so-called contract with one Samuel R. Bullock & Company, for the supplying and furnishing by said Bullock & Company to said

city, and the citizens thereof, water for fire and other purposes, for the full term of thirty years thereafter, at a certain fixed yearly rental of not less than $5200.00 for each of said years to be paid by said city to said company, for the water furnished for fire purposes.

Said city solicitor says that said defendant, The Defiance Water Company *Company*, claims to be the sole and absolute owner by
249 assignment, of said so-called contract, and of all the right, title and interest of said Samuel R. Bullock & Company therein, and that said The Defiance Water Company, has presented to said council, its bill for water rentals, amounting to $3142.50, claimed by said water company to be due it for water furnished to said city during the latter half of the year 1897, under and in accordance with the terms and provisions of said so-called contract, and said solicitor further says that no other agreement whatever, for the supplying or furnishing of said water to said city, save and except said so-called contract hereinbefore referred to, was ever entered into or attempted to be entered into, between said city, and said water company, or any other person or company under which it might claim.

Said city solicitor further says that unless restrained by this court from so doing, said city council, will cause said claim of said water company to be paid out of the public funds belonging to said city, and will also from time to time during the remainder of the term of said so-called contract cause to be also paid to said water company or its successors or assigns, out of the public funds of said city, large amounts of money for water rentals alleged to be due by reason of water to be furnished said city under said so-called contract, and for which wrongful and unlawful acts, plaintiff has no adequate and proper remedy at law.

Said solicitor further says that any such payment of any sum whatever to said water company, arising under or for any water furnished or supplied to said city, under said so-called contract, is a misapplication of the funds of said city, and a- abuse of its corporate powers, and would constitute the performance of a contract made on behalf of said corporation, in contravention of the laws of said State governing the same, in this, to wit:—

Said solicitor says that such so-called ordinance is or purports to be in substance, an agreement or contract between said city and said Samuel R. Bullock & Company, for the supplying of water for fire and other purposes to said city, and that by the express and
250 specific terms and provisions thereof, it was for the duration of the full term of thirty years thereafter, and that such so-called contract has not, at any time, been ratified by any vote of the electors of said, the city of Defiance, at any election therein, nor ever even been submitted to such voters for their ratification or rejection; and that said so-called contract is therefore invalid and void.

Said city solicitor further says that said so-called contract is illegal and void, for want of the certificate of the city clerk of said city (there being no city auditor in said city) that the money required for the payment of the debts, obligations and liabilities thereunder

was in the city treasury to the credit of the fund from which it was to be drawn and the payment made.

Said solicitor further — that by reason of the premises, that said water company is not entitled to demand, or have or receive, any sum of money whatever from said city for any water either already furnished by — to said city, or which it may hereafter furnish to said city under the terms or provisions of said so-called contract.

Wherefore said solicitor prays that until the final hearing of this cause said defendant, The City Council of the City of Defiance, Ohio, may be restrained by the order of this court, from paying or taking any proceedings whatever towards the payment, of said claim of the said defendant, The Defiance Water Company, out of the public funds of said city, or from paying or attempting to pay out of the funds of said city any other or further claims of said The Defiance Water Company for water furnished said city, and that upon the final hearing hereof, such temporary restraining order may be made perpetual, and for such other and further relief *and* as the premises may require.

THE CITY OF DEFIANCE, OHIO,
By EDWIN A. LATTY, *Its City Solicitor.*

251 THE STATE OF OHIO, }
Defiance County. }

Edwin A. Latty being first duly sworn on oath deposes and says, that the said plaintiff The City of Defiance, Ohio, is a municipal corporation duly existing under the laws of said State, and that he is the duly elected, qualified and acting city solicitor of said city, and that of his own personal knowledge, each and all of the facts, allegations, matters and things contained and set forth in said petition the aforesaid petition are true in substance and in fact.

EDWIN A. LATTY.

Subscribed to in my presence and sworn to before me this 4th day of January, A. D. 1898.

S. M. CAMERON,
Dept. Clerk.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants. } Precipe.

To the clerk of court:

Having reference to the caption hereof please issue summons for each of the several defendants named therein. Endorsed thereon "injunction allowed," and direct the same to the sheriff of Defiance county, Ohio, and make returnable according to law.

EDWIN A. LATTY,
Plaintiff's Attorney.

252 In the Court of Common Pleas of Defiance County, in the State of Ohio.

THE CITY OF DEFIANCE, OHIO, by Edwin A. Latty, Its City Solicitor, Plaintiff,
against
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendant-. } Order Allowing Injunction.

At chambers.

It appearing to me, J. H. Hockman, probate judge within and for the county of Defiance, in the State of Ohio, that there is no judge of the supreme court, or circuit court or of the court of common pleas of said State now within said county this matter came on for hearing upon the motion of the said plaintiff for a temporary restraining order herein as prayed for in plaintiff's petition, and the evedence, and it appearing that the interest of the plaintiff would be prejudiced herein were notice of this application to be given to the said defendant- it is therefore ordered that notice herein be dispensed with.

It is further ordered that a temporary restraining order be allowed herein, as prayed for in said petition restraining the said defendant- until such further order be made herein, and until said order shall be modified, set aside or made perpetual.

J. H. HOCKMAN,
Probate Judge.

January 4", 1898.

[Seal of the Probate Court.]

253 *Said petition is endorsed as follows:—*

"Case No. 6841. The City of Defiance, Ohio, by Edwin A. Latty its city solicitor. pl'ff. *vs.* The Council of the City of Defiance, Ohio, *et al.* def'ts. Defiance county common pleas. Filed Jan. 4, 1898, S. M. Cameron, dept. cl'k. Petition. Filed in circuit court Feb. 20, 1899. W. A. Schmaltz, clerk. Refiled in circuit court Mar. 14 1899. W. A. Schmaltz, clerk."

On said petition the following summons was issued:

Summons.

(R. S., sec. 5037.)

THE STATE OF OHIO, } *ss:*
Defiance County, }

To the sheriff of said county, Greeting:

You are hereby commanded to notify the Council of the City of Defiance, Ohio, and the Defiance Water Company that they have been sued by the City of Defiance, Ohio, by Edwin A. Latty, its solicitor in the court of common pleas of Defiance county, and must

answer by the 5 day of February, A. D. 1898, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 17 day of January, A. D. 1898.

Witness my hand and the seal of said court, this 4 day of January, A. D. 1898.

[Seal Clerk of Common Pleas.]

W. A. SCHMALTZ, *Clerk*,
By S. M. CAMERON,
Deputy Clerk.

254 *On said summons was endorsed:—*

"Court of common pleas. App. doc., page 225. The City of Defiance, Ohio, by E. A. Latty solicitor *vs.* The Council of the City of Defiance, Ohio, *et al.* Issued Jan. 4, 1898. Returnable Jan. 17, 1898, Summons in action for injunction allowed E. A. Latty plaintiff's attorney. Returned and filed Jan. 15 1898, S. M. Cameron, dept. clerk. Filed in circuit court, Feb. 20, 1899, W. A. Schmaltz, clerk. Refiled in circuit court Mar. 14, 1899, W. A. Schmaltz, clerk."

On said summons the following return was endorsed:

THE STATE OF OHIO, } *ss:*
Defiance County, }

Sheriff's Fees.

Service	40
Mileage	16
Copy	24
Return	25
Total	1.05

Sheriff's Return.

Received January 4th, A. D. 1898 and on the 4th day of January, A. D. 1898, I served the same by delivering to Charles Harris, the president *pro tem* of The Council of the City of Defiance, Ohio, defendant named herein, personally, a certified copy of the within summons and endorsements thereon, and also on said day, I served the same upon the within-named defendant, The Defiance Water Company, by delivering a true and duly certified copy of the within summons and endorsements thereon, to G. M. Eldrige, the managing agent and clerk of said corporation, personally, not being able to find within my county any president, or any other chief officer of said corporation.

J. P. EISER, *Sheriff.*

Dated January 4th, 1898.

And thereupon the following order was made in said cause and entered on the journal of said court, vol. 18, *page* 109 *under date of January 4th,* 1898, *as shown on page* 5 *of the transcript above.*

255 *Thereupon a petition and bond of the Defiance Water Company for removal of suit to the circuit court of the United States, as follows was filed January 19th, 1898:*

In the Court of Common Pleas of Defiance County, State of Ohio.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company, Defendants.

Petition for Removal of Suit to the Circuit Court of the United States.

Your petitioner, the said defendant, The Defiance Water Company, respectfully shows to the court that the above suit was begun against this defendant, in the said court of common pleas of Defiance county on or about the 4th day of January, A. D 1898.

That at the time the said suit was begun and now the said defendant, The Defiance Water Company, was and still is a corporation existing under the laws of said State of Ohio, with its principal place of business in the said city of Defiance in said county of Defiance.

That the matter in dispute in said suit between the said plaintiff, The City of Defiance, and this defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars.

That this is a suit of a civil nature in which there is a controversy arising under the Constitution of the United States, in this especially that by means of it, the said plaintiff seeks to abrogate the contract alleged in its suit and to deprive this defendant of its property, the amount alleged in said plaintiff's petition, to be due this defendant, under said contract, without due process of law and without
256 trial by jury; to which end and for which purpose, the said council of the said city of Defiance have colluded and conspired with the said plaintiff and it is by their said council's procurement that the said plaintiff has brought the said suit.

This defendant, your petitioner, herewith files a bond with good and sufficient sureties, for its entering in the circuit court of the United States for the northern district of Ohio, western division, on the first day of the next session of the said court, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, as provided by the statutes of the United States.

Wherefore the defendant, the said Defiance Water Company, prays this honorable court that this petition and bond may be accepted and approved and said suit be removed to the circuit court of the United States for the northern district of Ohio, western division, and that this court proceed no farther in the premises.

HENRY NEWBEGIN,
Attorney for said Defendant, the Petitioner.

THE STATE OF OHIO, *Defiance County,* } ss:

Henry Newbegin, being first duly sworn on his oath says that he is the general attorney of the said, The Defiance Water Company, duly authorized by it and charged with the duty of defending all suits against it at his discretion, and that the matter of fact alleged in the foregoing petition is true in substance and in fact, and that he believes the other allegations therein to be true and well taken.

HENRY NEWBEGIN.

257 Sworn to before me clerk of the said court, and in my presence subscribed by the said Henry Newbegin, this 19th day of Jan'y A. D. 1898.

S. M. CAMERON, *Dept. Clerk.*

Bond.

In the Court of Common Pleas of Defiance County, State of Ohio.

THE CITY OF DEFIANCE, by EDWIN A. Latty, Its City Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEfiance and The Defiance Water Company. } No. 6841. Removal Bond.

Know all men by these presents, that the Defiance Water Company, a corporation organized and existing under the laws of the State of Ohio, as principal and Peter Kettenring and Henry Newbegin as sureties, are held and firmly bound unto the City of Defiance, in the penal sum of five hundred dollars for the payment of which well and truly to make, unto the said City of Defiance, its successors and assigns, we hereby bind ourselves, our successors, assigns and representatives, firmly by these presents.

The conditions of this obligation are:—That, whereas, the said Defiance Water Company, having petitioned the court of common pleas of Defiance county, for the removal of a certain cause therein pending, wherein the said City of Defiance by Edwin A. Latty its city solicitor, is plaintiff and the council of said city and The Defiance Water Company are defendants, to the circuit court of the United States for the northern district of Ohio, western division.

258 Now if the said The Defiance Water Company, your petitioner shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue in law.

In witness whereof the Defiance Water Company has hereunto caused this bond to be signed, by its vice-president and its seal to be

fixed thereto by its secretary on this 19th day of Jan'y A. D. 1898, the said Peter Kettenring and Henry Newbegin have also signed their names thereto on the same day.

THE DEFIANCE WATER COMPANY,
By PETER KETTENRING,
Its Vice-President.

Attest: W. J. McGOINGALE, *Secretary.*

PETER KETTENRING.
HENRY NEWBEGIN.

[Seal of the Defiance Water Co.]

Said petition and bond for removal are endorsed as follows:

"No. 6841. The City of Defiance by Edwin A. Latty, its city solicitor *vs.* The Council of the City of Defiance and The Defiance Water Company. Petition and bond of the Defiance Water Co. for removal of suit to the circuit court of the United States. Filed Jan. 19, 1898. S. M. Cameron, dept. clerk. Henry Newbegin, attorney. Filed in the circuit court Feb. 20, 1899 W. A. Schmaltz, clerk." Refiled in circuit court Mar. 14, 1899 W. A. Schmaltz, clerk.

259 *Thereupon the following journal entry was entered in said case under date of March 12th, in volume* 18, *page* 167.

THE CITY OF DEFIANCE, OHIO, by E. A. LATTY, Its City Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE DEFIANCE WATER COMPANY. } No. 6841.

This day this cause came on to be heard upon the petition of the said defendant, The Defiance Water Company, for removal of the cause into the circuit court of the United States for the northern district of Ohio, western division, and the court finding that the said petition with a bond therefor have been filed herein, within the time required by the act of Congress for that purpose, and the said petition and bond are in due form and this cause one that is removable to said circuit court of the United States. It is hereby ordered that the said petition and bond be and the same are hereby accepted, and the said bond and sureties thereon are hereby approved, and it is further ordered that this cause be removed into the said circuit court of the United States.

And during vacation in the June term, 1898, the following entry was made herein,

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*

J. 18, 380.

At a stated term of the circuit court of the United States within and for the western division of the northern district of Ohio, began and held at the city of Toledo, in said district, on first Tuesday in

June, being the 7" day of said month in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-
260 second, to wit, on Friday, the 24th day of June, A. D. 1898.

Present: The Honorable E. S. Hammond, judge sitting by designation.

Among the proceedings then and there had were the following, to wit:—

THE CITY OF DEFIANCE, OHIO, by E. A. LATTY, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE DEFIANCE WATER COMPANY. } Equity.

This day came the parties by their attorneys and thereupon this cause came on to be heard upon the motion of the City of Defiance and the motion of the Council of the City of Defiance to remand this cause, to the court of common pleas of Defiance county, Ohio. On consideration whereof the court do grant said motion and do order that this cause be and the same is hereby remanded to the court of common pleas of Defiance, for further proceedings to which the Defiance Water Company by its counsel excepted, and it appearing to the court that this cause was improperly removed into this court, it is ordered and adjudged that the said defendant, The Defiance Water Company pay the costs of this proceeding herein taxed at $—

It is further ordered that the clerk of this court transmit to the court of common pleas of Defiance county, a certified copy of this order under the seal of this court.

And the Defiance Water Company is granted leave to withdraw from the files its cross-bill against the City Council of the City of Defiance and the City of Defiance, heretofore filed herein: and it is further ordered that no final record be made in this cause.

261 THE UNITED STATES OF AMERICA, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for the northern district of the State of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original order to remand entered upon the journal of the proceedings of said court in the therein-entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness my official signature and the seal of said court at Toledo, in said district this 14" day of September, A. D. 1898, and in the 123 year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk.*

Filed in the common pleas court of Defiance county, Sept. 17, 1898.

And on the 31" day of the June term, to wit, Oct. 15th, 1898, the following order was entered herein:

THE CITY OF DEFIANCE, OHIO, by E. A. Latty, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, *et al.*
} No. 6841. J. 18, 422

Leave is granted defendant to plead forthwith which is accordingly done.

262 *And afterward, to wit: on the 15th day of October, 1898, the following demurrer to petition was filed:*

In the Court of Common Pleas of Defiance County.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
against
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendants.
} Demurrer to Petition.

The said Defiance Water Company, protesting to the jurisdiction of this court, herein, for the reason that this cause has been improperly remanded to this court by the circuit court of the United States for the northern district of Ohio, western division, now comes and demurs to the petition of the said plaintiff against the said defendants for that the facts set forth in said petition do not in law constitute a cause of action.

HENRY & ROBERT NEWBEGIN,
Attorneys for the said Defiance Water Company.

Said demurrer is endorsed as follows:—

"No. 6841 The City of Defiance *v.* The City Council and The Defiance Water Co. Demurrer to the petition of the Defiance Water Co. Filed Oct. 15, 1898, W. A. Schmaltz, cl'k. Henry & Robert Newbegin att'ys for water Co. Filed — circuit court
263 Feb. 20 1899 W. A. Schmaltz, clerk. Refiled in circuit court Mar. 14, 1899 W. A. Schmaltz, clerk."

And on the 28th day of November term, 1898, to wit, January 16th, 1899, the following ordered was entered herein:

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company.
} No. 6841. J. 18, 555.

This day this cause came on to be heard upon the demurrer of the said defendant, The Defiance Water Company, to the petition of

the plaintiff and the same having been argued by counsel and the court fully advised in the premises, the court is of the opinion that the said demurrer is well taken and ought to be sustained.

It is therefore ordered that said demurrer be and the same is hereby sustained.

And it is further ordered that the temporary injunction hereinbefore allowed be and the same hereby is dissolved. And the said plaintiff not asking to amend its petition on motion of the said defendant, The Defiance Water Company, it is further ordered and adjudged that said petition be and the same is hereby dismissed, and that the said defendant recover its costs herein, by it expended and taxed at $— and that the plaintiff pay its own costs herein made.

Thereupon came the plaintiff by George T. Farrell, its city solicitor and gave written notice of its intention to appeal this suit to the circuit court of this county, and the court fixes the bond for that purpose at the sum of one hundred dollars.

264 *Thereupon the following notice, under date of January* 16" 1899 *was filed in said cause, to wit:—*

In the Court of Common Pleas, Defiance County, Ohio.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, Plaintiff, vs. THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company.	Notice of Intention to Appeal.

Now comes the said plaintiff and gives notice of its intention to appeal said cause to the circuit court.

THE CITY OF DEFIANCE, OHIO,
By GEORGE T. FARRELL,
City Solicitor.

Said notice is endorsed as follows:—

"Filed Jan. 16, 1899 W. A. Schmaltz, Filed in circuit court Feb. 20, 1899, W. A. Schmaltz, clerk. Refiled in circuit court Mar. 14, 1899. W. A. Schmaltz, clerk."

265 *Thereupon on January 16th, 1899, the following appeal bond was filed in said cause, to wit:*

Appeal Bond.

Revised Statutes, secs. 522–'30–'31.

Know all men by these presents: That we, The City of Defiance, Ohio, by its city solicitor, George T. Farrell, city solicitor, plaintiff and George T. Farrell city solicitor of Defiance, Ohio, and B. F. Enos, are held and firmly bound unto The Council of the City of Defiance, Ohio, and The Defiance Water Company, defendants, in the penal sum of one hundred dollars, to the payment of which, well

and truly to be made, we do hereby jointly and severally bind ourselves our heirs, executors and administrators. Signed by us, and dated this 16th day of January, A. D. 1899.

The condition of the above obligation is such that, whereas, the said plaintiff in cause No. 6841 in Defiance common pleas court has taken an appeal from a certain judgment and decree rendered against it in favor of the said defendants in the court of common pleas within and for the county of Defiance, in the State of Ohio, at the November term thereof, A. D. 1898, for the sum of $— dismissing plaintiff's petition and for costs to the circuit court within and for said county aforesaid.

Now if the said appellant shall abide and perform the order and judgment of said circuit court, and shall pay all moneys, costs and damages, which may be required of or awarded against it by said circuit court, then this obligation shall be void; otherwise it shall remain in full force and virtue in law.

(Signed) THE CITY OF DEFIANCE, OHIO,
By GEORGE T. FARRELL, *City Solicitor.*
GEORGE T. FARRELL,
City Solicitor, of Defiance, Ohio.
B. F. ENOS.

I approve the above bond with the sureties thereto, this
266 16th day of January, A. D. 1899.

W. A. SCHMALTZ,
Clerk Clerk *of Court.*

Said appeal bond endorsed as follows:

"No. — Doc. — Page — Court of common pleas Defiance county. Appeal bond. The City of Defiance by Edwin A. Latty its solicitor *vs.* The Council of the City of Defiance, and The Defiance Water Company. Filed Jan. 16, 1899 W. A. Schmaltz, clerk. Filed in circuit court Feb. 20 1899 W. A. Schmaltz, clerk."

And afterwards, to wit, on March 14th 1899, the following motion was filed:

In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company.

Motion of the Defiance Water Company to Dismiss Appeal.

Now comes the said Defiance Water Company by Henry and Robert Newbegin, its attorneys and moves the court to dismiss the appeal of said City of Defiance herein for that:

It does not appear from the record and papers herein filed that the said plaintiff within three days after the judgement (of the court of common pleas was entered) entered on the records of the court of common pleas notice of its intention to appeal.

The said City of Defiance, plaintiff has given no appeal bond or undertaking such as is required by law in order to appeal
267 said suit from the said court of common pleas to this county.

No authenticated transcript of the docket and journal entries and of the final judgment of the said court of common pleas in this cause with the original papers and pleadings have ever been delivered or filed at or in the office of the clerk of this court.

No copy of appeal bond or undertaking has been filed herein or otherwise appears on the records of this court, nor does it anywhere appear from the records and papers of the cause in this court that any appeal bond or undertaking in this cause was ever given.

From all the record- and papers of the cause in this court it does not appear that this court has jurisdiction of the cause.

HENRY & ROBERT NEWBEGIN,
Attorneys for the Defiance Water Company.

Said motion is endorsed as follows:

"In the circuit court of Defiance county, The City of Defiance, &c. *vs.* The Defiance Water Co. *et al.* Motion to dismiss appeal. Filed Mar. 14, 1899 W. A. Schmaltz. For def't Water Co. Henry & Robert Newbegin, attorneys-at-law, Defiance, Ohio. Refiled in circuit court Mar. 14, 1899 W. A. Schmaltz, clerk."

And afterwards, to wit on March 14th, 1899, the following motion was filed:

THE STATE OF OHIO, }
Defiance County, } *ss:*

In the Circuit Court.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its Solicitor, }
vs. }
THE COUNCIL OF DEFIANCE, OHIO, and THE DEFIANCE WATER Company, Defendants. }

Now comes the plaintiff by George F. Farrell, its solicitor
268 — moves the court for leave to be permitted to file a complete transcript herein properly certified and sealed by the clerk of the common pleas court of said county.

THE CITY OF DEFIANCE,
By EDWIN A. LATTY, *Its Solicitor,*
By GEORGE T. FARRELL,
Successor in Office of Edwin A. Latty as Such Solicitor.

Said motion is endorsed as follows:—

"The City of Defiance *vs.* The Council of the City of Defiance, *et al.* Motion. Filed in circuit court Mar. 14, 1899, W. A. Schmaltz, clerk, by M. A. Costello deputy. Refiled in circuit court Mar. 14, 1899 M. A. Costello, deputy cl'k."

Thereupon the following entry was made in said cause under date of March 14th, 1899 and recorded in vol. 1, page 365.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE DEFIANCE WATER COMPANY, Defendants. } No. 247.

This day this cause came on to be heard upon the motion of the plaintiff to be permitted to file a complete and properly certified and sealed transcript of this cause herein and the court being fully advised in the premises grants said motion and leave is granted said plaintiff to file such transcript which is accordingly done this 14 day of March.

269 *And thereupon the following order was made in said cause under date of March* 15" 1899, *and recorded in vol.* 1, *page* 366:—

In the Circuit Court of Defiance Co., Ohio.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its Solicitor, Plaintiff in Error,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE Defiance Water Company, Defendants in Error. } No. 247.

This day this cause came on to be heard on the motion to dismiss appeal for the reasons stated in said motion and was argued by counsel and submitted to the court, and the court being fully advised finds that said motion is not well taken and therefore overrules said motion. And on application leave is given to file a correct and duly certified transcript of the docket and journal entries made in the common pleas court in this case, within thirty days from the rising of this court, and this cause is continued.

Said order is endorsed as follows:—
"No. 247. The City of Defiance, Ohio, *vs.* The Council of the City of Defiance, and The Defiance Water Co. J. E. J. 1–366."

Thereupon the following motion was filed in said case on the 15th of March, 1899.

270 THE STATE OF OHIO, } *ss:*
Defiance County, }

In the Circuit Court.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company. } Motion.

The appellant moves the court for leave to supply transcript of docket entries from the common pleas court, pending the hearing

the motion to dismiss the appeal for lack thereof and suggests diminution of the record for that purpose.

THE CITY OF DEFIANCE, OHIO,
By EDWIN A. LATTY, *Its Solicitor*,
By GEORGE T. FARRELL,
Successors in Office of Edwin A. Latty as Such Solicitor.

Said motion is endorsed as follows:—
"The City of Defiance by Edwin A. Latty, etc. *v.* The Council of the City, etc. *et al.* Motion. Filed in circuit court March 15, 1899. W. A. Schmaltz, cl'k by M. A. Costello, deputy."

And thereafter on the 12th day of September, 1899, the following motion to dismiss appeal by Defiance Water Co. was filed in said cause, to wit:—

271 In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, OHIO, by Edwin A. Latty, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company.

No. 247. Motion of the Defiance Water Company to Dismiss the Appeal.

Now comes the said Defiance Water Company, by Henry & Robert Newbegin, its attorneys and moves the court to dismiss the appeal of the said plaintiff herein, for that, it does not appear that any undertaking for appeal, such as is required by law, was ever given or entered into by the said plaintiff within thirty days after the entering of the judgment from which the appeal is sought to be taken, nor at any other time. And for that the undertaking given by the said plaintiff, is utterly inadequate in amount to protect the interests of this defendant, if the court finds it sufficient in form; and this defendant asks that though the court shall find the said undertaking sufficient in form, said appeal be dismissed, unless the said plaintiff be required to give a new undertaking in an amount that the court shall find sufficient to protect the interests of the defendant and with good and sufficient sureties.

H. & R. NEWBEGIN,
Attorneys for the Defiance Water Company.

Said motion is endorsed as follows:
272 "Circuit court of Defiance Co. No. 247—The City of Defiance *v.* The Defiance Water Co. *et al.* Motion to dismiss appeal by Defiance Water Co. Filed Sep. 12, 1899 W. A. Schmaltz, clerk. H. & R. Newbegin, att'ys for water Co. Refiled as amended Oct. 16 1897 M. A. Costello, deputy clerk."

Thereupon the following order under date of Oct. 25th, 1899, was entered in vol. 1, 374:

THE CITY OF DEFIANCE, ETC.,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and THE Defiance Water Company. } No. 247.

This 24th day of October, A. D. 1899, this cause came on for hearing upon the motion of the defendant, The Defiance Water Company, to dismiss the appeal. And the court upon the hearing of the said motion are of the opinion that the undertaking given herein for appeal by the said plaintiff is insufficient, in form and amount. It is thereupon ordered and adjudged that the said plaintiff shall give a new undertaking for its appeal within twenty-four hours from this date, in the amount of one thousand dollars with good and sufficient sureties, conditioned according to law, to the approval of the clerk of this court, and on this 25th day of October, A. D. 1899, came the plaintiff and submitted to the court said new undertaking as required by the above order, and it appearing to the court that said new undertaking as to its form and amount is sufficient the same is approved and ordered to be filed in this case, when the sureties thereon are approved by the clerk of this court and said bond is filed accordingly.

273 *Said order is endorsed as follows:—*

"No. 247. J. E. Approved J. L. Price, P. J. Oct. 25, 1899. J. 1 374."

Thereupon the following appeal bond was filed under date of Oct. 25th, 1899, to wit:

Appeal Bond.

Revised Statutes, secs. 5227–'30–'31.

Know all men by these presents, that we, The City of Defiance, Ohio, by Edwin A. Latty, its city solicitor, by George T. Farrell, city solicitor, George T. Farrell, B. F. Enos, Fidelity and Deposit Company of Maryland, are held and firmly bound unto The Council of the City of Defiance, Ohio, and The Defiance Water Company, defendants in the penal sum of one thousand dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Signed by us, and dated this 24th day of October, A. D. 1899.

The condition of the above obligation is such, that, whereas, the said plaintiff in cause No. 6841 in the court of common pleas of Defiance county, Ohio, has taken an appeal from a certain judgment and decree rendered against it in favor of the said defendants in the court of common pleas within and for the county of Defiance, in the State of Ohio, at the November term thereof, A. D. 1898, dismissing plaintiff's petition and for costs to the circuit court within and for the county aforesaid.

Now, if the said appellant shall abide and perform the order and judgment of said circuit court, and shall pay all money, costs and damages, which may be required of or awarded against it by said

circuit court, then this obligation shall be void; otherwise it shall remain in full force and virtue in law.

274 THE CITY OF DEFIANCE, OHIO,
(Signed) By GEORGE T. FARRELL, *City Solicitor.*
GEORGE T. FARRELL.
B. F. ENOS.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By W. D. HILL, *Member of Local Board.*

[Seal Fidelity Co.]

Attest: R. H. GLEASON, *Agent.*

I approve the above bond with the sureties thereto, this 25th day of October, A. D. 1899.

[Seal of Clerk.]

W. A. SCHMALTZ, *Clerk.*

Said appeal bond is endorsed as follows:—

"No. 247 Doc. 1 Page 247 Court of common pleas Defiance county. Appeal bond. The City of Defiance by Edwin A. Latty, etc. *vs.* The Council of the City of Defiance, *et al.* Filed in circuit court October 25, 1899. W. A. Schmaltz, clerk by M. A. Costello, deputy."

And thereupon the following order under date of October 27th, 1899, was entered in said cause, in vol. 1, page 379, to wit:—

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants. } No. 247.

This day came the parties hereto by their respective attorneys, and this cause came on for hearing on the demurrers of the defendant, The Defiance Water Company to the petition of the plaintiff and by the court taken under advisement.

275 THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants. } No. 247.

This day came the parties in the above-entitled action by their respective attorneys, and the court coming now to announce its opinion and judgment on the demurrer, heretofore submitted herein, finds that the said demurrer of the defendant, The Defiance Water Company, to the petition of the said plaintiff is not well taken and that the same should be overruled and the same is accordingly overruled. To which said finding and decision the said defendant, The Defiance

Water Company, by its counsel then and there excepted and now excepts.

Thereupon the said plaintiff in open court asked leave to file an amended and supplemental petition, and the court being of the opinion that said application should be allowed it is ordered that the said plaintiff have leave to file an amended and supplemental petition herein, on or before December 1st, 1899, to the granting of which leave to amend petition and file a supplemental petition the Defiance Water Company excepts; and the said defendant The Defiance Water Company, has leave to plead thereto by the first Saturday in January, 1900, and this cause is continued.

Said order is endorsed as follows:—

"No. 247. The City of Defiance, etc. *vs.* The Council of the City of Defiance, Ohio, and The Defiance Water Company. Journal entry. Clerk of circuit court; enter the within entry on journal of circuit court under date of October 27th, 1899. James L. Price, presiding judge. J. 1. 379."

276 *Thereupon the following agreement was filed on December 6th, 1900:*

In the Circuit Court of Defiance County, Ohio.

THE CITY OF DEFIANCE, ETC., Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, ET AL., Defendants.

It is hereby agreed that the time given by the court for the plaintiff to file amended and supplemental petition is extended till the 2nd Saturday in January, A. D. 1900, and the defendant Defiance Water Co., has right to plead thereto by the 2d Saturday in February, 1900.

THE CITY OF DEFIANCE,
By EDWIN A. LATTY, &c.,
By GEORGE T. FARRELL.
HENRY NEWBEGIN,
For Defiance Water Company.

Said agreement is endorsed as follows, to wit:

"No. 247. The City of Defiance, etc. *vs.* The Council of the City of Defiance, etc. Extension of time to plead. Filed in circuit court Dec. 6, 1899 W. A. Schmaltz, clerk."

And thereafter on the 10th day of February, 1900, the following was filed in said cause, to wit:

In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
against
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendants.

Answer of the Def't The Defiance Water Company.

277 The said defendant, The Defiance Water Company, by Henry and Robert Newbegin, its attorneys, in answer to the petition of the plaintiff in this case, denies:—

1st. That the payment for water supplied or to be supplied by this defendant to the said city of Defiance by the said city, is or will be a "misapplication of the funds of said city, and an abuse of its corporate powers, and would be the performance of a contract made on behalf of said corporation, in contravention of the laws of said State governing the same."

It denies that said contract "has not at any time, been ever ratified by a vote of the electors of the said city of Defiance, at any election therein, nor ever even been submitted to such voters for their ratification or rejection," and it denies that said contract is invalid and void.

It denies that said contract "is illegal and void, for want of the certificate of the city clerk of said city that the money required for the payment of the debts, obligations or liabilities thereunder was in the city treasury to the credit of the fund from which it was to be drawn and the payment made," and

It denies that it "said water company is not entitled to receive payment from said city for water already furnished and to be furnished by it to said city under the provisions of said contract."

2nd. Answering further this defendant says: That the plaintiff ought not to maintain its suit against this defendant because it says:—That on the 17th day of August, A. D. 1887, the said city of Defiance, by its city council, duly passed an ordinance entitled "An ordinance to authorize and provide for the construction and maintenance of a system of water works in the city of, Defiance, Defiance county, Ohio." That among the other provisions of said ordinance, it was ordained and provided in section one, "that in consid-
278 eration of the public benefit to be derived therefrom the right and privilege is hereby granted for the period of thirty years from the time that this ordinance takes effect, unto Samuel R. Bullock and Company, their associates, successors and assigns of erecting, maintaining and operating a system of water works in said city" and of using the streets, alleys and public squares, and of all other public places "therein," for the purpose of laying pipes, mains and other conduits and of erecting hydrants, etc., by means of which said Bullock & Co. and their assigns might be able to furnish water to the said city and the public.

Under the provisions of section three of said ordinance it was provided and the said city of Defiance thereby contracted with said

Samuel R. Bullock & Co. and their assigns, "in consideration of the public benefit, and the protection to property resulting from the construction of said system of water works," that the said city through and by its council, should and it did thereby "rent of the said Samuel R. Bullock and Company their associates, successors and assigns, one hundred and thirty double-nozzled, frost-proof fire-hydrants, for the aforesaid period of thirty years at the annual rental of forty dollars per year for each hydrant, payable semi-annually, on the first days of January and July in each and every year." It was further provided by section three of said ordinance that the said city might rent additional hydrants over and above the said 130, at the rate of thirty-five dollars each, per year, payable as aforesaid, during the unexpired period of the said term of thirty years, the same to be constructed and put in as a part of said water works, by the said Samuel R. Bullock & Co. and their assigns on demand of the said city. It was further contracted between the parties, as provided by said section three of said ordinance, that the said city might use the water from the said hydrants "for extinguishing of fires and necessary fire practice, and for flushing
279 sewers," and also "for all sanitary purposes, and the washing out of gutters and ditches in the streets of said city."

For the consideration aforesaid it was further provided, in section four of said ordinance, that the said Bullock & Co. their successors and assigns should furnish water "free of charge to the public and parochial schools, Defiance college, Defiance Riverside cemetery, and all public buildings used for city purposes, now erected or which may be hereafter erected during the live of this franchise, also for five public drinking fountains with openings for man and beast, an ornamental fountain, additional drinking hydrants when deemed necessary (by the city); also all waters for the Defiance Agricultural Society during the meeting of their annual fair."

It was further provided in said ordinance in section 5 that "the said Samuel R. Bullock & Co., their associates successors and assigns, should procure the organization of a water-works corporation under the laws of the State of Ohio and might assign to it all of the rights and privileges acquired" under and by virtue of said ordinance and contract. And that the council of the said city of Defiance should pass and enact such further and other ordinances, and do and perform such other acts and things, including the repassage of said ordinance in favor of the said corporation as might be necessary to vest in said corporation the rights and privileges thereby and therein granted.

It was further provided in said ordinance (section six) that upon the completion of the construction of said system of water works the said Samuel R. Bullock & Co., their associates, successors and assigns should submit the water works to a certain test named therein, on the satisfactory performance of which test to said city council, the said city through its council agreed formally to accept said system and said Samuel R. Bullock & Co., their associates, successors and assigns were required further by said ordinance to file their
280 written acceptance of said contract and *and* ordinance, in the office of the said city clerk of the said city of Defiance, with

their bond in the penal sum of five thousand dollars, executed to the said city of Defiance, and condition- for the faithful compliance with the terms of said ordinance and contract. Further provisions of the said ordinance required the said Samuel R. Bullock & Co., their associates, successors and assigns, to make extention of their water mains whenever required to do so by the said city council, provided that no extention should be less than five hundred feet in length and that one public hydrant should be located on each five hundred feet thereof.

There was a further provision in said ordinance (section nine) by which it was agreed between the parties thereto, the said Samuel R. Bullock & Co. and their assigns and the said city of Defiance, that the said city at the expiration of ten years after said ordinance took effect, should have the right to purchase the said system of water works upon giving six months' previous notice thereof, upon certain terms named in said ordinance, and upon failure to give the said notice of purchase at the expiration of said ten years the city still had the right and privilege to exercise its right to purchase the said water works upon such notice at the end of five years thereafter and so at the end of each five years thereafter during the said term of thirty years.

Further answering this defendant says that the said Samuel R. Bullock & Co. on behalf of themselves their associates, successors and assigns filed in the office of the city clerk of the said city of Defiance, their written acceptance of said ordinance and contract, together with their bond in the penal sum of five thousand dollars, executed to the said city and conditioned for the faithful performance of said ordinance and contract according to the terms
281 thereof; and thereupon, they, the said Samuel R. Bullock & Co. entered upon the construction of said water works in accordance with the terms of said ordinance and contract; that during the construction thereof the said Samuel R. Bullock & Co. became largely involved in indebtedness contracted to different persons and companies on account of the furnishing and supplying material and loans of money to pay for the work of such construction etc.; especially had said company became indebted to Dennis Long & Company, a corporation of the city of Louisville, State of Kentucky, for water pipes and other material supplied to it and used or intended to be used in the construction of said water works, in the sum of $49,175.00, and to the firm of Boody McLellan & Co., bankers of the city of New York, and N. T. Sprague in the total sum of about $100,000.00 more. That failing to pay the same during the fall or winter of 1887, the said Dennis Long & Company placed their claims against the said S. R. Bullock & Company in the hands of an attorney for collection, and through their said attorney were about to bring suit and levy an attachment on the said water works and material therefor in satisfaction of their said claim; when by agreement of all the parties in interest and with the assent and knowledge of the said plaintiff, The City of Defiance, said Bullock & Co. assigned and transferred to The Defiance Water Company, this defendant, a corporation which was then organized for the purpose

with a capital of $200,000.00 all of their right and interest in the said property and water works, and in the said contract with the said city for furnishing it with water under its ordinance as aforesaid. And said creditors of said Samuel R. Bullock & Company each took an amount of stock in said corporation so organized, in proportion to the several amount- of the indebtedness of the said S. R. Bullock & Co. to each of them.

This defendant further says that said Bullock & Co. assigned and transferred their said right and interest in the said property water works and contract to this defendant corporation in the fol-
282 lowing manner: That the said creditors as aforesaid each agreed to take stock in the said corporation, so organized in proportion to their said right and interest in the property and water works as was represented by the amount of the indebtedness of said Bullock & Co. to them severally and thereupon having taken the interest of the said Bullock & Co. as aforesaid and agreed to carry out their contract with the plaintiff, the said City of Defiance, at the special instance and request of the said city made by its council who represented to them at the time, that, unless the said water works was completed, the city would be without any means whatever of extinguishing fires, as it had already provided for the abandonment of its fire-engines and other means and were to rely upon the use of the hydrants of said water works for that purpose: and the said city council specially requested the said Dennis Long & Co., Boody, McLellan & Co. and N. T. Sprague to go on and complete the construction of the said water works, and then and thereby promised and agreed with them in consideration thereof that the said city would take and use the water provided by the said company for extinguishing fires, and rent of said company the number of hydrants named therein during the term of their said contract. And relying upon the said representations of the said city and the promise and agreement of the said city to pay for the use of the water so to be furnished it, they proceeded to complete the construction of the said water works.

Thereupon said Defiance Water Company, this defendant went on and completed the construction of the said water works as aforesaid, all in accordance with the terms of said ordinance and contract with the said City of Defiance, the plaintiff to the entire satisfaction of said city and its council; so that the said water works stood and performed the test as above set forth and required by the said city council to the satisfaction of the said city council, and the
283 same the said water works were formally accepted by the said city council by its resolution to that effect passed on the fifth day of March, A. D. 1889.

This defendant further says that the actual cost of the construction of the said water works and of the extention of the mains and of the placing of the hydrants therein as they existed at the time of the beginning of this suit, amounted to the sum of $196,000.00 for which amount the bonds of the said corporation, this defendant, were issued secured by a mortgage on all the company's plant and

property constituting the said water works, which said bonds and mortgage are still outstanding, unsatisfied in whole or in part.

That at the time of the issuing of the said bonds they all were taken by the parties in interest the said creditors of Samuel R. Bullock & Co.

That the said Dennis Long & Co., Boody, M'Clellan & Co. and N. T. Sprague took the assignment of the said interest of the said Samuel R. Bullock & Co., in said contract and ordinance and completed the construction of the said water works and took and received the said bonds in satisfaction of their said claims in full faith and belief that the said City of Defiance, the plaintiff, would comply with its contract for the use of said water as aforesaid; and from the rentals of the said hydrants and the revenues derived therefrom, to the said city, they relied for payment for all and any remuneration whatever on their money so invested. And this defendant says; that, except from the revenue to be derived from the said rentals and from their contract with the said plaintiff, The City of Defiance, it has no resource or means whatever from which to pay their interest upon said bonds or any part thereof, that the total revenue from all other sources, derived in the operation of its said water works, is wholly insufficient to meet the expenses of their
284 said operation, and that the net annual revenues derived from all sources including the said annual rentals of said hydrants to the city of Defiance, if paid, according to the terms of said contract, is not sufficient to pay at most more than two and one-half per cent. of interest on its said bonds so outstanding. Which said bonds are drawing interest at the rate of six per centum per annum, and for which this defendant is holden thereon.

This defendant further says, that at the completion of said water works, it had constructed the said one hundred and thirty hydrants so rented to the city at forty dollars per annum, and also at the same time at the request of said city it had put in and constructed additional hydrants and thereafter at the request of said city, from time to time down to July 5th, 1895 it had extended its mains and constructed additional hydrants, which in accordance with the terms of its said contract, the city has rented at thirty-five dollars each per year — annum, and that the total number of said additional hydrants amounted to thirty-two. For one of said hydrants, not used by the city since January first, 1897, no charge has been made by this defendant and no bill has been rendered to the said city therefor. That the said city is now using the said one hundred and thirty original hydrants at the contract price of $40.00 each per annum and thirty-one additional hydrants at the contract price of $35.00 each per annum, and that all the time from the completion of the said water works and from the placing of the said additional hydrants, as aforesaid at the request of the city, to the present time the said city, the plaintiff, has used the same under its said contract for the purposes aforesaid, has held the possession and control of the said hydrants and this defendant has furnished and supplied water to the said city continuously by means thereof for the purposes aforesaid and the said city, the plaintiff is still

using the said water for such purposes, holding possession of
285 the said hydrants, and, this defendant is still furnishing and supplying the said city with water therefrom, under the terms of the said contract. This defendant also has furnished during all of the said time at very large expense to itself and is still furnishing to said city, and to the public free of charge for the purposes named in section four of said ordinance and contract and for other purposes all the water required by the terms of said contract so to be furnished free to the city and the public. On the demand of the said city from the completion of its said water works to the present, it has furnished free of charge to the Central school building water for general use therein, and on August 11th, 1898, the said city without notice to this defendant added two sets of new closets and urinals to those formerly in use therein since which time this defendant has supplied the same with water free, and is now supplying it. The said city rebuilt the Second Ward school building, completing the same in the year 1898, and demanded of this defendant that it should furnish a largely additional amount of water, free under its contract, over what it had furnished to the old building; which demand this defendant complied with and since the completion of said building it has furnished and is now furnishing water free in said building for the use of four wash-basins, two range water-closets of 11 bowls each, and one range urinal.

That from the completion of said water works to 1898 this defendant had furnished for the old Second Ward school building free, water for the use of one closet, one sink, and one urinal, and that from the completion of said water works until August, 1898, this defendant had furnished free to the said Central school building and is still furnishing the same water for the use of two wash-
basins, two privy vaults, flushed weekly, for yard sprinkling,
286 and for one fountain with five jets. That is addition of the above under said contract from the completion of its said water works to the present time it has furnished and is still furnishing free water for two other schools for the use of two range water-closets, four wash-basins and yard sprinkling. To the city barracks it has furnished water and is still furnishing it for the use of two sinks, two water-closets, and yard sprinkling. To three ward buildings it has furnished free and is still furnishing water for the use of three closets, three sinks, and three urinals. To the city hall it has furnished free since the completion of said water works and is still furnishing water for sprinkling, for the use of four horses, two closets, and one bath-tub. For the Defiance cemetery at the request of said city it has furnished free since the completion of said water works and is still furnishing water for the use of one large and two small fountains and for all purposes of sprinkling said cemetery, including the watering of the shrubbery and plants therein. At the request of said city, this defendant has furnished free since the completion of said water works and is still so furnishing it, water for drinking fountains in each of the four wards of said city. The said water flowing and being used continuously throughout the year. It has furnished at the request of said city since the comple-

tion of said water works and is still furnishing it water free for the use of the following churches, to wit: For the Baptist church for the use of sink and baptist-ry, for the Lutheran church, water for motor power for organ, for privy vault, and for sprinkling school yard, for the English Catholic church, water for motor for its organ, for wash-basin, for privy vault and for sprinkling the yard of its school.

287 This defendant further says that the said city, the plaintiff, has paid semi-annually as they accrued from the time of the completion of said water works, down to the time that the injunction was allowed in this suit at its commencement in the court of common pleas, all of the rentals for the said 161 hydrants, so rented by this defendant to the said city, at the contract price, and without ever questioning or denying the validity of said contract, except as hereinafter set forth, except the sum of $500 of the installment due July 1st, 1895, for the first six months of that year; which sum it refused to pay upon other grounds than the invalidity of the said contract, and for which sum of $500 this defendant brought suit against the said city, in the court of common pleas of this county, which suit is now pending therein. And that after the said injunction had been allowed, in this case, and while the said city council, claimed it to be in force, against them, said city paid on the installment of rents for said hydrants that had accrued for the last half of the year 1897, and due and payable under the said contract on January 1st, 1898, about the sum of $756.

That many of said additional hydrants were put into the said water works, by this defendant, in accordance with the said contract, long after the said water works had been constructed and accepted by the said city, and the company's mains were extended for that purpose upon the special request and order of said city, the plaintiff, and for its use.

That from the time of the completion of the said water works and the construction of the said hydrants the said City of Defiance, the plaintiff, has had entire control and possession of the said 161 hydrants so constructed by this defendant and has used them

288 as its means of extinguishing fires in said city and for the other purposes named in said contract and it still retains the control and possession of the said hydrants and is still using them for the purposes aforesaid, and the said city council and the said city the plaintiff have refused to allow or pay anything whatever to the defendant for the use of the said water since the commencement of this suit, except said sum of about $756, and have all the time retained and still retain the possession and control of the said hydrants and refused to deliver to this defendant the possession of them, and also refuse to quit using this defendant's water from the said hydrants. And further the said city, the plaintiff, and the said city council deny that they are under any obligation to pay this defendant anything whatever for the use of its said property as aforesaid, either under the said contract or on account for the value of the water so as aforesaid used by the city and by the public for what the same may be reasonably worth.

This defendant further says that on January 7th A. D. 1896 without any prior or subsequent notice thereof given to this defendant,

at the time that the said city council allowed and the said city paid the full installment for water rents that had accrued to this defendant for the last half of the year 1895 the said city council passed an ordinance or resolution in substance rescinding and annulling so far as it had power to do the said contract of the city with this defendant, stating in said ordinance, that the payment of the said bill should not be "construed or taken to be any acknowledgment of any contract between them and the said water company for said water rental, or in any manner implying any actual performance of any alleged contract, and that no further payment at the present rate be made to the said company." Thereby abrogating so far as it was in the power of the council and the said city to do, the said con-
289 tract existing between the said plaintiff, The City of Defiance, and this defendant, The Defiance Water Company, contrary to the provisions of article 11, section 28 of the constitution of the State of Ohio, and article 1, section 10 of the Constitution of the United States. Notwithstanding which, as aforesaid, the said council allowed and the said city paid the full hydrant rentals falling due thereafter down to the last half of the year 1897, due at the time of the bringing of this suit, January 1st, 1898, of which last installment as aforesaid, the city paid the sum of $756 after the commencement of this suit.

This defendant further says that this suit was instituted and the said injunction obtained by the said city solicitor, against the payment of its past-due water rentals, and those which were to accrue thereafter, by the collusion, connivance and procurement of the said city council or certain members of it, for the express purpose of evading the payment to this defendant of its just dues for its said water rentals, under the guise and claim of the illegality of the said contract.

That according to the terms of said ordinance, section five, and under their contract with this defendant, if the said ordinance in its passage had not in all respects been in compliance with law, it was the duty of the said council to re-enact the same and pass such further ordinances, all in compliance with the law and to procure the ratification of the same, by the voters of the said city of Defiance, if such was necessary for the validity of said ordinances as they had agreed to do under their contract with this defendant in said section five of the said ordinance. And that, if in fact said ordinance and contract was not ratified by the vote of the electors of the city of Defiance, as is alleged in the plaintiff's petition, it will not be per-
mitted to the said plaintiff to allege the fact; but that the
290 law presumes that the same was ratified by the vote of the electors as aforesaid, and that everything was done that was necessary to be done by the said city to make the said contract legal and binding on it.

That having enjoyed all the fruits of the said contract, and having used the water of this defendant for the purposes named under the contract and still using the same and retaining possession of the property of this defendant, as aforesaid the said city is now estopped from denying the validity of the contract and from refusing to pay the consideration price named therein.

This defendant further says that the object and prayer of the said petition of the city in this suit is not to have said contract held invalid on account of its illegality, nor to rescind the same, but to evade paying the contract price both for accrued rentals in the past and in the future, alleging therein that this defendant "is not entitled to demand, or have or receive any sum of money whatever from said city for any water either already furnished to said city or which may hereafter be furnished to said city, under the terms or provisions of said so-called contract," and the prayer of the said petition is to the same effect, alone. That nowhere in the said petition or prayer is there a tender back to this defendant of the property held by the said city in its possession; and that it would be a gross fraud upon the rights of the defendant for a court of equity to permit the plaintiff to retain the property of the defendant and enjoin the defendant from collecting the value of it.

This defendant further says that by granting the prayer of the petition it would permit the said plaintiff, through its council to have the use of the property of the plaintiff both in the past
291 and for the future without paying therefor and without power on the part of this defendant to collect the value thereof, and it would be in effect a deprivation by the city and its said city council of this defendant, of its property without due process of law, contrary to the provisions of the constitution of the State of Ohio and of the Constitution of the United States, and further it would deprive this defendant of its property without trial by jury as to the value thereof, contrary to the provisions of the constitution of the State of Ohio.

This defendant further says that by its bill in equity brought in the circuit court of the United States for the northern district of Ohio, western division, and now pending therein, against the said City of Defiance, and the said City Council of the City of Defiance, as joint defendants, in which suit the said defendants have answered, and this defendant, the complainant therein, has filed its replication to such answer, thereby completing the issues of fact in said suit, and which is now ready for final hearing, as soon as the taking of evidence shall be completed, it is sought by this defendant the complainant therein, to collect the water rentals due this defendant from the said city under the said ordinance and contract; that if the prayer of the plaintiff's petition herein shall be granted, it will in legal effect enjoin this defendant, the complainant in said suit, from prosecuting the same further or from otherwise as aforesaid, collecting said rentals, and that the final hearing of this suit ought to be continued, pending the adjudication of the rights of all the parties herein in said suit of equity in the said circuit court of the United States.

Wherefore having fully answered this defendant prays that it may be hence dismissed without day and recover its costs
292 in this behalf most wrongfully sustained.

HENRY & ROBERT NEWBEGIN,
Attorneys for the said Defendant,
The Defiance Water Company.

THE STATE OF OHIO, } ss:
Defiance County, }

Henry Newbegin one of the attorneys for the said defendant, being first duly sworn says, that he believes the matters of fact alleged in the foregoing answer are true.

HENRY NEWBEGIN.

Sworn to before and in my presence subscribed, this 10th day of February, A. D. 1900.

M. A. COSTELLO,
Deputy Clerk.

Said answer is endorsed as follows:

"No. — In the circuit court of Defiance county. The City of Defiance, etc. against The Council of the City of Defiance, *et al.* Answer of the Defiance Water Co. Filed in circuit court Feb'y 10, 1900. W. A. Schmaltz clerk by M. A. Costello, deputy. Henry & Robert Newbegin, Defiance, Ohio, attorneys for Defiance Water Co."

Thereupon on the 22nd day of February, 1900, the following reply of plaintiff to answer of the Defiance Water Company was filed in said cause, to wit:—

293 In the Circuit Court of Defiance County, Ohio.

THE CITY OF DEFIANCE, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
against
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendants.

No. —. Reply of the Plaintiff to the Answer of the Defendant The Defiance Water Company.

Replying to the answer of the said defendant The Defiance Water Company, plaintiff avers and says, that it has no knowledge or information touching the indebtedness of said Bullock & Company, or of the furnishing of material or money or either to said Bullock and Company by said Dennis Long and Company, Boody, McLellan and Company and N. T. Sprague, or any or either of them or of the proceedings or acts of said parties relating thereto; and plaintiff denies each and every, all and singular the allegations and statements in said answer touching said subject and each thereof, and particularly denies that anything whatever was done by said parties or any or either of them with the assent or knowledge of said city. Said plaintiff has not now nor never had knowledge or information as to the manner in which said Bullock and Company made an assignment or transfer to said water company, and denies said city or its council knew of such an assignment or transfer until many months after the same was made, and they had no other or further knowledge or information than the mere fact that such an assignment had been executed; and this plaintiff denies that
294 said city or its council ever made any request whatever to said parties or to said water company touching said alleged

contract or the carrying out of the same; and denies that the said city made the representations set forth and alleged in said answer or any representations whatever to said Bullock and Company or their creditors or any or either of them; and denies that said city council requested said Dennis Long and Company, Boody McLellan and Company and N. T. Sprague or any or either of them to complete said water works and deny that said city or its council made the promise and agreement set forth in said answer or any or either thereof or made any promise and agreement whatever to all, any or either of said persons or firms, and denies that any or either of said persons or firms relied on any promise or agreement of said city or its council.

Plaintiff admits that said council passed a resolution accepting said water works, but denies that said water works ever performed said tests set forth and prescribed in said ordinance. Plaintiff denies that said water company or any persons or person ever completed said water works in accordance with the terms of said alleged ordinance or ever done or performed the terms, provisions or conditions prescribed and set forth in and by said ordinance.

Plaintiff denies that the costs of said water-works extensions and hydrants was one hundred and ninety-six thousand dollars, or that they cost or were or are worth to exceed ninety thousand dollars. Plaintiff avers upon information and belief that said Dennis Long and Company, Boody, McLellan and Company and N. T. Sprague took said water plant and all its extensions, materials and rights of every name, nature and description and all its capital stock for whatever claims they had against said Bullock and Company and for what they did in and about the construction of said plant;
295 and avers that they caused said bonds of said water company to be issued and divided among themselves without any consideration whatever moving therefor; and avers that the said several parties and said water company furnished whatever if any material and money they did furnish and took said stock and bonds and did whatever they did touching said water works and said alleged contract with full knowledge and notice and chargeable with knowledge and notice that said alleged contract between said city and said Bullock and Company was illegal, without force or effect, and was by law declared void, and that no obligation could be incurred by said city by reason thereof.

Plaintiff denies that said Bullock and Company or said defendant ever had any contract whatever with said city for one hundred and thirty hydrants or any number of hydrants whatsoever, at any rate or price; denies that said city is holding possession of said hydrants or any hydrants of or furnished by said company; and denies that said city refused to give up possession of any hydrants to said water company.

Plaintiff admits that said water company has pretended to furnish water as alleged in said answer for schools, churches, public buildings, street sprinkling, fountains and drinking, but avers the water furnished has never been fit or suitable for any purpose other than

street sprinkling, fire purposes and the like, and often and a great portion of the time has not been suitable or fit for those purposes.

Plaintiff admits that the council of said city paid a large sum of money to said water company under said illegal, void, and prohibited contract and paid all except five hundred dollars; that said water company ever asked from said city up to the commencement of this action and avers that but for the commencement of this action said city council would have kept on giving the funds of
296 said city to said water company under said illegal and void contract. Touching said payment of money after the allowance of the injunction herein plaintiff says, that said defendant water company applied for a modification of said injunction so as to allow the payment of seven hundred and fifty-six dollars to said company and thereupon the judge, who had allowed said injunction modified the order so as to order the payment of said sum to said company.

Plaintiff admits that said city has used hydrants for fire purposes when occasion required and there was sufficient pressure so as to make said water of any use and when the mains, pipes and hydrants were not stopped up with mud.

Plaintiff denies that said city and said city council has ever refused to deliver possession of said hydrants or any part of them to said water company, but on the contrary said water company has ever disclaimed any wish or intention or desire to have said city abandon the use of said hydrants, but claim- it will make said city retain the use of them and since the commencement of this action has brought the suit referred to by it in its answer herein for the purpose of compelling said city to retain possession of said hydrants and pay therefor.

Plaintiff denies, that, on the 7th day of January, 1896, or at any other time said city council or said city passed any ordinance or resolution in substance, or at all rescinding or annulling, so far as it had power so to do, or at all, said alleged contract between said city and said water company, and denies that thereby, or at all, said council and said city or either abrogated or attempted to abrogate said alleged contract, contrary to any provision of the Constitution of the United States, or at all.

Plaintiff denies that in the instigation of this suit and in the obtaining of the injunction herein the city council of said city
297 or any member thereof had any part whatsoever or that said suit was brought by or through the procurement, collusion or connivance of any member of said council of said city.

Plaintiff denies that either section five of said ordinance of August 17th 1887, or any other section thereof imposed any duty or obligation on said council or said city, and denies that said ordinance or the contract alleged to have been entered into by the passage and acceptance thereof could be ratified or confirmed by said council or said city in any other manner than by the vote of the electors thereof; and plaintiff denies that said alleged contract, or any part thereof, or any, all or either of the provisions of said ordinance thereof have been ratified or confirmed by said city or its voters in

any manner whatsoever. Plaintiff avers that whatever was done by said city council under said alleged contract with said Bullock and Company was done contrary to the provisions of the statutes of Ohio, and all said acts and proceedings were prohibited by law as by the terms of the said statute it was required that a vote first be had by the electors of said city, and further without such vote first had such contract shall not be executed or binding on said municipality; and plaintiff avers that there were no water works in said city at or prior to the time defendant's plant was constructed and the question of entering into the contract with said Bullock and Company or said water company or any company or person was never submitted to the voters of the city of Defiance in any manner whatever, and plaintiff denies that any estoppel or ratification could arise or accrue out of any performance or attempted performance of such prohibited and illegal contract by said city or its council. Plaintiff denies that any judgment or proceeding in this cause could or would de-
298 prive the defendant of any property without due process of law in violation of the Constitution or at all, or could or would deprive the defendant of a jury trial in contravention of the laws of Ohio or at all.

Plaintiff admits that defendant has commenced a suit in equity in the United States court for the northern district of Ohio, western division against the other parties to this action; but this plaintiff avers that the bill in said suit in equity was first prepared and filed as a cross-bill in this cause, and afterwards filed as such bill in equity in said Federal court, and the object and prayer thereof is to enjoin this plaintiff and the said city council from disputing the validity of said alleged contract and from refusing to carry out the same for a finding of the amount due said water company under its claim thereon, and that said council and city be ordered to pay the same; and this plaintiff avers that said suit was commenced after said defendant had been served and had answered in this cause, and said cause is now pending in said circuit court of the United States on a motion to dismiss the same or postpone further proceedings therein until this cause is finally disposed of in this court.

Further replying to said answer and especially to defendant's answer and charge that said city is estopped to deny the legality, sufficiency and binding force of said alleged contract and is estopped from refusing to pay the moneys claimed by said water company from said city: and further especially replying to said defendant's answer and claim that said city has passed laws impairing the obligation of said alleged contract, and that said city is depriving and will deprive said defendant of its property without due process of law, this plaintiff, not hereby relinquishing its contention that said so-called ordinance of August 17th 1887 is void and illegal and does not constitute a contract with said city, and that said alleged con-
tract and all proceedings thereunder are illegal and void and
299 of no force or binding effect on said city, but still insisting and relying thereon avers and says,—that in and by section one of said ordinance it was provided, among other things, that the purpose and consideration therefor was "the furnishing an adequate

supply of good, wholesome water to the city of Defiance and its inhabitants for public and private use," and in and by section two of said ordinance it was provided, among other things that "the water shall be taken from such points as shall be free from all sewer contamination and shall be taken from a crib or well and shall at all times be good wholesome water, fit for all purposes of domestic and manufacturing use."

That in and by section 11 of said ordinance it was provided among other things, that "if at any time the pressure gu*a*ges located at the point hereinabove named shall indicate a pressure of less than forty pounds on the distributing mains for the period of two weeks in succession, then the rental for the use and employment of hydrants for the purpose aforesaid shall cease until the pressure in this section provided for shall be attained; provided, however, if the pressure indicated as aforesaid shall be less than forty pounds to the square inch for four calendar months in succession then all the rights and privileges of the said Samuel R. Bullock and Company, their associates, successors and assigns acquired by virtue of this ordinance shall cease, determine and become null and void."

That in and by section twelve of said ordinance it was provided: "The said Samuel R. Bullock and Company, their associates successors or assigns, shall have the right to make all the needful rules and regulations governing the consumption of water, and tapping pipes, and general operation of the works, and to make such other rates and charges for the use of said water, as they may determine; provided that said rates and charges do not exceed the rates and charges hereinafter provided."

300 That in and by section thirteen of said ordinance it was provided: "It is hereby further ordained that the said Samuel R. Bullock and Company, their associates, successors and assigns may charge and collect the following rates for water furnished by them, payable in quarterly installments in advance. The connections between the mains and the consumers, shall be made at the consumers' expense and the lowest annual rate to one consumer, in any case shall not be less than five dollars."

Annual rates.

Banks, one faucet	$8 to $10.
Bakeries, daily average of each barrel of flour used, per barrel	3,50
Do. provided no license less than	8,00
Barber shop first chair and basin	5,50
" " each additional chair	2,50
Bath private without heating	3,75
" with heating	5,00
" hotels or boarding-houses one tub cold	8,00
" each additional	4,00
" public per tub	7 to 15,00
Blacksmith shops first fire	4,00
" " each additional fire	1,50
Building purposes for hundred brick	.10

Stone per perch..... .07
Plaster per hundred yards..... .30
Boarding-house per room..... 1,25
Provided, no license less than..... 10,00
Halls, theaters and hotels special.
Laundries.....$10 to 20,00
Offices, with wash-basin..... 5 to 10,00
301 Printing offices, six hands or less.....$12,00
" " each additional 1,50
" " water motor special.
Butcher shop..... $6 and up
" " but no license less than..... 5,00
Cigar factory per hand 1,50
Photograph gallery..... ..... $10.00 to 30,00
Rooms occupied by one family five rooms or less..... 5,00
" " each additional room..... 1,00
Stables private, including carriage-washing one horse..... 2,50
Each additional horse..... 1,50
Cow each..... 1,50
Restaurants..... 10.00 to 50.00
Livery, boarding or sale stables, including carriage-washing per horse..... 1.50
No license less than..... 10,00
Steam boilers, per horse-power..... 2,50
" " large special rates.
Saloons, two self-closing bar faucets..... 15,00
" one self-closing and one hose bar faucet 15,00
Wash-basin, self-closing faucet..... 4,00
" store and shop self-closing faucet..... $5, to 20.00
" store and manufactories combined special.
" urinals private, on- basin self-closing faucet 4,00
" banks and offices..... 5,00
" restaurant and saloons..... 5,00
" public..... 8,00
Wash-basins in dwelling, in addition to one faucet..... 1,00
" hotel wash-room, self-closing faucet, one basin... 5,00
302 Sprinkling cart one day, special.
Churches, free.

Meter rates.

A daily consu-ption of 100 to 1000 gals. per 1000 gals..... 40
1000 to 2000 gallons per 1000 gallons..... 35
2000 to 3000 " " " " 30
3000 to 5000 " " " " 25
5000 to 10000 " " " " 20
Above 10000 " 15

Season rates.

Sprinkling lawns with one-eighth-inch nozzle four hours per day 66 feet front or less 5,00
Each additional foot front..... 10
Street corners, lot measurement on both fronts for street sprinkling per foot front ..... .05

Fountains to be used not over six hours per day for the season of six months, as follows:

$\frac{1}{16}$-inch jet	8,00
$\frac{1}{8}$-inch jet	16,00
$\frac{3}{16}$-inch jet	35,00
Soda fountains	$10,00 to 25,00

Purposes not mentioned, and large consumers, special.

That in and by section fourteen of said ordinance it was provided: "Any neglect or refusal on the part of Samuel R. Bullock and Company, their associates, successors or assigns, after due notice shall have been given them to comply with all the requirements of this ordinance, shall cause a forfeiture of the hydrant rental
303 until each and all of the said requirements herein provided for are complied with."

Plaintiff says that during and for a long time prior to the month of January, 1896, said defendant water company had not supplied the city of Defiance, or its citizens with good or wholesome water or water fit for all or any purposes of domestic or manufacturing use, or even fit or suitable for fire purposes, that said company had not maintained a pressure of forty pounds to the square inch, but had maintained and kept a much lower pressure, so low in fact that oftentimes when said water was necessary for use in extinguishing fires a stream of water could not be thrown by use of hose and nozzle attached to said hydrants into the second story of an ordinary building and said water sup-lied was practically worthless for fire purposes. That the water was frequently frozen in said fire-hydrants and said hydrants and water supply *was* often useless by reason thereof. That from and after September, 1895, said water company charged all water-consumers in said city of Defiance largely in excess of the rates and charges prescribed in and by said ordinance as the maximum rates to be charged and refused to furnish water at less rates, all of which facts were well known to said defendant, but none thereof were remedied by it although said city and its council may frequent demands on said water company to do so and notified it to comply with each and every, all the said requirements of said ordinance, but said defendant ever neglected and refused to do so and from said time down to the time of the commencement of this suit and ever since and now, said water company does not at any time furnish to any person in said city good and wholesome water or water fit or suitable for any domestic purpose but ever neglected and refused to so do, and from said time down to the present has charged and collected from each and all of its customers,
304 citizens of said city of Defiance, Ohio, rates and charges for water in excess of the maximum schedule of rates and charges to be charged under the terms and provisions of said ordinance, and has ever refused to make charges as stipulated and provided by the terms and provisions of said ordinance and not greater, though often requested so to do.

Plaintiff further says that while said conditions aforesaid were existing, *i. e.*, shortly before the seventh day of January, 1896, said

water company presented a bill to said city council of said city of Defiance for the full amount named in said ordinance, to wit, for the sum of three thousand, one hundred and sixty dollars, the amount claimed by said company for the city's water rent and use of fire-hydrants for the last six months of the year 1895, and that, at a meeting of said council of said city of Defiance held on the 7th day of January, 1896, said bill was under consideration by said council, the general manager, one G. M. Eldrige, of said company, was there present for the purpose of procuring the allowance of said bill, and then and there on behalf of said company he urged the allowance of said bill, plead the pressing needs of said company, promised said company would furnish good, wholesome water, sufficient pressure and efficient service in future, and stated and represented that the said city would not and should not waive any of its rights or incur any additional obligations to said company by making said payments; thereupon under said representations and to evidence that understanding and agreement and to make payment subject thereto and to give said company the formal notice prescribed by said section fourteen of said ordinance of August 17th, a resolution was drafted, with the knowledge and approval of said company's said manager to evidence and consummate said representations and understanding, which said resolution was and is the so-called resolution or ordinance referred to in defendant's answer herein,
305 and is the law which defendant alleges annuls, rescinds and abrogates the said alleged contract between said water company and said city and impairs the obligation thereof. Said resolution is entitled "a resolution to draw warrant in favor of the water company for $3160.00" (a true copy of which is hereto attached marked Exhibit "A" and filed herewith, and to which this plaintiff begs leave to refer). That at that time, to wit, January 7th, 1896, said city and its council first learned and had knowledge and information that the said alleged contract was invalid and that the liability had been incurred by the city thereunder. Thereupon said city council desiring and intending not to waive any rights of the city by the unconditional payment of money by said city under said alleged contract, but for the purpose of preserving the rights of said city and its citizens to challenge said alleged contract in the future, if it should be necessary so to do, and desiring and intending to again notify said company that it was not complying with the requirements of said ordinance of August 17th, 1887 and that it should do so the said council voted in favor of said resolution.

That said city or said city council did not by said resolution repeal, annul, abrogate or impair or intend to repeal, abrogate or impair the said alleged ordinance of August 17th, 1887, or any part thereof, or the contract or any part thereof, alleged to have been made thereby; that neither said defendant, nor said city or its council understood, considered, or treated said resolution as a repeal, impairment or abrogation of, said ordinance or said alleged contract; but on the contrary pursuant to the terms of said resolution the claim of said water — for $3160.00 was placed on said claim ordinance of said city and said claim ordinance was duly passed by said

council on said 7th day of January, 1896, and said bill thereby ordered paid and the same was paid to said water company, as was each and every installment of water and hydrant rental
306 claimed by said company, up to the time the city council was enjoined from making further payments by the order of court made in this action.

Plaintiff avers that said resolution January 7th, 1896, hereinabove set forth was and is not an ordinance, but was and is merely a resolution and did not repeal, abrogate, impair or annul said ordinance of August 17th 1887, or said alleged contract evidenced thereby, for that said resolution was not read on three different days in or by said council, and such reading was not dispensed with by the ayes and nay vote of three-fourths of the members of said council; and said resolution was never published in any newspaper whatever and said resolution never had and never could have the force or effect of in any manner or degree abrogating, repealing, an-ulling or impairing said ordinance, or the alleged contract evidenced thereby or any part or portion thereof or either thereof.

That the said city of Defiance or the council of said city or the city solicitor or any of them have never claimed and do not now claim any release or immunity from said alleged ordinance of August 17th, 1887, or any part thereof or from the contract or any part thereof alleged to be evidenced and expressed thereby by reason of the said resolution of said council of the city of Defiance, of January 7th, 1896, further than whatever effect said resolution may have as notice to said company of its failure to comply with the terms of said ordinance; that said plaintiff said city council or said solicitor or any or either of them never have claimed or asserted and do not now claim or assert any right, benefit, release or immunity, from the terms of said ordinance of August 17th, or any part thereof or from *said* the obligations — alleged contract evidenced thereby or any part thereof under or by reason of said resolution of January 7th, 1896, further than said resolution is a notice to said company as aforesaid.
307 Said plaintiff disclaims any and all reliance on or benefit of said resolution as releasing or intending to release said city from the obligation of said alleged contract or from said ordinance further than by reason of the notice to said water company therein contained, and denies that said city, said city council or said solicitor have ever claimed or now claim that said city was or is released or discharged from said alleged contract by reason of said resolution; but said city and said city solicitor claim and since the commencement of this action have claimed and relied on the illegality and invalidity of the said ordinance of August 17th and on the invalidity of the contract claimed to be evidenced thereby and not on the said resolution of January 7th 1896.

Plaintiff further says that said city or its said council are not and cannot be estopped from averring, alleging or proving the illegality of said alleged contract, "or from refusing to pay the consideration price named therein" by reason of the foregoing facts and as well for that in addition to the notices given said water company that it was not complying with the terms of said ordinance and that it

should do so, as hereinabove alleged, on February 17th 1891, February 5th 1894, July 2nd 1895. November 7th 1895 December 9th 1895, January 7th 1896, December 31st 1896, September 21st 1897, January 1st, 1898, and many other times prior to the commencement of said action said company was likewise duly notified by said city to comply with the terms of said ordinance, and since the commencement of this action on the 2nd day of March, 1899, the city by its council duly gave to said water company a notice in writing in the words and figures folllowing:

308 "On motion of Mr. Schneider the water committee of said council was instructed to serve the following notice on the Defiance Water Company by the following vote:

Ayes—Coy, Groselle, Harris, Morse, Schneider, Shulters. 6.

DEFIANCE, OHIO, *Feb. 28th*, 1899.

To the Defiance Water Company, Defiance, Ohio:

If it shall be finally determined in the causes now pending in the State and United States courts, or in either thereof, or in any other cause in any court of final jurisdiction, that, the Defiance Water Company has a valid contract with the city of Defiance for hydrant rental with said city and for supplying said city and its inhabitants with water under and by virtue of the terms and provisions of the alleged ordinance of August 17th 1887, water rentals would be due and payable by said city not otherwise than under and subject to the terms and conditions of said ordinance, which prescribes, among other things, that after the said water works are put into operation, if at any time the pressure *guages* shall indicate a pressure of less than forty pounds on the distributing mains for the period of two weeks in succession, then the rental for the use and employment of the hydrants for the purposes aforesaid shall cease until the pressure in this section provided for shall be attained; certain maximim rates, as set forth in section 13 of said ordinance are prescribed, which may be charged for water, that the water shall be taken from such point as shall be free from all sewerage contamination, and shall be taken from a crib or well and shall at all times be good wholesome water, fit for all purposes of domestic and manufacturing uses; and that said company shall furnish double-nozzled frost-proof fire-hydrants.

309 Although, you have been repeatedly notified, you are again hereby notified, that the said water company has not complied with and is not complying with any or either of said provisions, and by the terms of said section 14, of said ordinance it is provided that any neglect or refusal on your part to comply with all the said requirements of said ordinance after notice given you shall cause a forfeiture of the hydrant rental until each and all of the said requirements provided for are complied with. And you are hereby notified that if it be determined a valid contract exists between said city and said water company you are not and will not be entitled to any hydrant rental under the terms of said ordinance and the notices heretofore given you and under this notice unless all the terms and

provisions of said contract shall have been complied with, and which provisions have not been and are now now being complied with by you."

but disregarding said notice the said water company has not since that time charged to the inhabitants of the city of Defiance water rent or charges prescribed by said ordinance, and has not, at any time, furnished to said city or its inhabitants good and wholesome water or water fit or suitable for any domestic purpose, but has ever neglected and refused to do so, and has supplied only muddy, foul and unwholesome water, not fit for any domestic use and has ever charged prices and rates for water to all consumers in excess of said schedule fixed in and by the terms of said ordinance.

Wherefore, having fully replied to the said answer of the said defendant water company the said plaintiff prays as it has heretofore in its petition herein prays.

GEORGE T. FARRELL,
City Solicitor of the City of Defiance, Ohio,
Attorney for Plaintiff.

310 THE STATE OF OHIO, }
Defiance County, } *ss:*

George T. Farrell being first duly sworn, says he is the city solicitor of the city of Defiance, Ohio, above named, and as such is the successor of Edwin A. Latty, city solicitor named in the caption hereof, and that the facts stated and allegations contained in the foregoing reply of the said plaintiff to the answer of the defendant, The Defiance Water Company, are true as affiant verily believes.

GEORGE T. FARRELL.

Sworn to before me and subscribed in my presence by the said George T. Farrell this 22nd day of February, A. D. 1900.

M. A. COSTELLO,
Deputy Clerk.

EXHIBIT "A."

A resolution to draw warrant in favor of the water company for $3,160.00.

Whereas, the Defiance Water Company have submitted a bill to the city council for $3160.00 alleged to be due them from the said city for water rental for the past six months:

And whereas, said council are of the opinion that no water contract exists or is between said city and said company for the payment of the same; and furthermore that said bill is in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity:

And whereas, the best interest- of the — in their opinion demand that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to said city upon
311 fair and equitable terms, therefore.

Be it resolved, That the city clerk is hereby directed to forth-

with draw his warrant of the city treasurer against the water fund of said city for the sum of $3160.00, in favor said Defiance Water Company, in full payment of said bill: Provided, however, that if said warrant be accepted by said company, it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgment of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to said company.

Passed Jan. 7th. 1896.

H. D. BOKOP, *President.*

Attest: J. J. MALLEY, *City Clerk.*

The above and foregoing resolution was adopted by the following vote: Ayes—Andreson, Bokop, Coy, Diehl, Hatry, Kingsbury, Kniss, Krotz,—8.

Said reply is endorsed as follows, to wit:—

"No. 247 In Defiance circuit court. The City of Defiance, Ohio by Edwin A. Latty, its city solicitor, plaintiff against The Council of the City of Defiance, Ohio, and The Defiance Water Company. defendants." "Reply of plaintiff to answer of the Defiance Water Company." "Filed Feb. 22, 1900. W. A. Schmaltz, clerk. George T. Farrell attorney for pl'ff."

Thereupon on the 3rd day of March, 1900, the following motion was filed in said cause, to wit—

312 In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, by EDWIN A. LATTY, Solicitor, etc., *vs.* THE COUNCIL OF THE CITY OF DEFIANCE ET AL. } Motion.

The defendant herein, The Defiance Water Company by Henry & Robert Newbegin, its attorneys, moves the court to require the plaintiff to separate its denials from the affirmative matter pleaded in its reply, and if it claims more than one cause of reply in said affirmative matter that the causes be separately stated and numbered.

Said-named defendant further moves the court to require the plaintiff to make its reply certain and definite by setting out the date of the alleged service on this defendant of the notice named and copied into its reply and dated February 28th. 1899,

H. & R. NEWBEGIN,
Att'ys for said Defendant.

Said motion is endorsed as follows;—

"No. —. Circuit Ct. of Defiance Co. The City of Defiance, etc. *vs.* The City Council etc. and The Defiance Water Co. 'Motion to require denials in reply to be separated from affirmative matter and to make reply certain and definite.' Filed in circuit court Mar. 3. 1900. M. A. Costello, deputy clerk. H. & R. Newbegin att'ys for water Co."

313 *And thereupon on the 13th day of March, 1900, the following entry was made in said cause, and recorded in Journal —, page 389, to wit:*

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company.
} No. 247.

This day came the parties hereto, by their respective attorneys and this cause came on to be and was heard upon the motion of the defendant, The Defiance Water Company, to require the denials in reply to be separated from the affirmative matter and to make the reply certain and definite and was argued and submitted by counsel and taken under advisement by the court.

And thereupon the following demurrer to reply was filed in said cause, to wit, on the 13th of March, 1900.

In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, by EDWIN A. LATTY, Its City Solicitor,
against
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company.
} Demurrer to Reply.

The said Defiance Water Company, defendant herein, by Henry & Robert Newbegin, its attorneys, demurs to the affirmative matter pleaded and set up in the reply of the plaintiff herein filed, for that the facts as therein alleged do not in law constitute a reply to
314 this defendant's answer, and further the said reply upon its face is insufficient in law.

HENRY & ROB'T NEWBEGIN,
Attorneys for Defendant The Defiance Water Company.

Said demurrer is endorsed as follows:

"No. 247. In the circuit court of Defiance Co. The City of Defiance, etc. *vs.* The Defiance Water Company *et al.* Demurrer to reply. Filed Mar. 13, 1900. W. A. Schmaltz, clerk. H. & R. Newbegin, att'ys water Co."

And thereupon the following order was made in said cause under date of March 14th, 1900, and recorded in Journal 1, page 391—to wit:

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company.
} No. 247. Appeal.

This day came the parties to the above-entitled action by their several and respective attorneys, and the court coming now to an-

nounce its opinion and ruling on the motion heretofore submitted herein, finds that said motion requiring plaintiff to separately state and number its causes, and to separate its denials from the affirmative matter is not well taken and is therefore overruled, and that said motion or so much thereof, requiring plaintiff to make
315 its reply certain and definite by setting out the date of the alleged service is well taken and is therefore sustained and said plaintiff is granted leave to amend its reply by interlineation, which is accordingly done.

And thereupon the following order was made in said cause under date of March 14th, 1900, which order is recorded in Journal 1, page 391, to wit:—

THE CITY OF DEFIANCE, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company, Defendants.
} Order Allowing Bill of Exceptions.

This day came the defendant The Defiance Water Company by its attorneys and presented to the court its certain bill of exceptions this day taken in open court and prayed that the same might be allowed which is hereby accordingly done, and it is further ordered that the same be and it is hereby made a part of the record of this cause and ordered to be filed with the papers of the case, but not spread upon the journal of the court.

And afterwards and before the hearing of the demurrer of the said Defiance Water Company to the reply of the plaintiff herein the said defendant The Defiance Water Company objected to the jurisdiction of the court to hear or determine any of the issues raised in this cause for the reason that said cause is now pending in the circuit court of the United States for the northern district of Ohio, western division, the same having been improperly and ille-
316 gally remanded to the court of common pleas of this county; but the court overruled the said objection to which the said defendant The Defiance Water Company duly excepted at the time and still excepts.

And thereupon the following order was made in said cause under date of March 16th, 1900, recorded in Journal 1, page 396, to wit:—

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company.
} No. 247.

This cause is this day continued by the order of court, for want of time to try.

317 *Thereupon on the 14th day of March, 1900, the following bill of exceptions was filed in said cause, to wit:—*

THE CITY OF DEFIANCE, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company, Defendants.
} Bill of Exceptions.

Be it remembered that at the March term of the said circuit court of Defiance county, A. D. 1900, to wit, on the fourteenth day of March, A. D. 1900, after *that* the said court had announced its decision on the motion of the said defendant The Defiance Water Company to require the said plaintiff to separate its denials from the affirmative matter of its reply and to make its said reply more certain and definite, came the said defendant, The Defiance Water Company, and asked leave to file an amendment to its answer herein filed so as to raise the question of the jurisdiction of the court to try this cause, which said amendment so asked to be filed is in the words and figures following, to wit:

In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendants.
} Amendment to Answer of the Defendant The Defiance Water Company.

318 Now comes the said Defiance Water Company and by leave of court files this its amendment to its answer herein filed, and says:

2nd. That at the March term, A. D. 1898, of the court of common pleas of this county this suit upon the petition of this defendant was duly and legally removed to the circuit court of the United States for the northern district of Ohio, western division, and that then and thereby the said circuit court of the United States acquired jurisdiction thereof and the said court of common pleas ceased to have jurisdiction of said cause. Notwithstanding which at the June term, A. D. 1898, of the said circuit court of the United States, to wit, on the 24th day of June, the said cause was wrongfully and illegally ordered remanded by said court to the said court of common pleas; but that by reason of said wrongful and illegal order remanding said cause, the said circuit court of the United States did not lose nor did the said court of common pleas acquire jurisdiction thereof and that this court here now has no jurisdiction in the premises to hear and determine this cause, for that the same is still legally pending in the said circuit court of the United States for the northern district of Ohio, western division.

H. & R. NEWBEGIN,
Attorneys for said Defendant.

STATE OF OHIO, *Defiance County,* } ss:

Henry Newbegin being first duly sworn, says that he is attorney for the said defendant in the above-entitled case; that said defendant is a corporation; that the facts alleged in the foregoing amendment to the defendant's answer are true as he verily believes.

HENRY NEWBEGIN.

319 Sworn to before me and in my presence subscribed this 14 day of March, A. D. 1900.

M. A. COSTELLO,
Deputy Clerk.

But the court overruled the said application for leave to file said amendment and refused to permit the same to be filed, to which order and ruling of the court said defendant The Defiance Water Company by its counsel duly excepted at the time. And thereupon on the same day in open court it came and presented this its bill of exceptions to the court and prayed that the same might be allowed and signed as a true bill of exceptions and made a part of the record of the cause, but not spread at large upon the journal of the court; all of which is hereby done and ordered in open court on the said fourteenth day of March, A. D. 1900.

JAMES L. PRICE,
CALEB H. NORRIS,
JAMES H. DAY,
Judges Circuit Court, 3rd Circuit of Ohio.

Said bill of of *exceptions is endorsed as follows:*

"No. 247. In the circuit court of Defiance county. The City of Defiance, etc., against The Defiance Water Company *et al.* Bill of exceptions. Filed Mar. 14, 1900. M. A. Costello, deputy clerk. Henry & Robert Newbegin, Defiance, Ohio, attorneys for water company."

[Seal Common Pleas Court of the County of Defiance, Ohio.]

320 And afterwards, to wit, on the 23rd day of October, A. D. 1900, the following proceedings were had herein and entered on Journal 1, page 404, in the words and figures following, to wit:

THE CITY OF DEFIANCE, OHIO, by Edwin A. Latty, Its City Solicitor, Plaintiff,

vs.

THE COUNCIL OF THE CITY OF DEFIANCE, Ohio, and The Defiance Water Company, Defendants.

No. 247. Leave Granted the Plaintiff to Supply the Petition Instanter by Filing Certified Copy of Same.

And afterwards, to wit, on the 23rd day of October, A. D. 1900, the said plaintiff filed a certified copy of the petition herein, which certified copy is transcribed on page — herein.

And afterwards, to wit, on the 8th day of November, A. D. 1900, the following proceedings were had herein and entered on Journal 1, page 412, to wit:

In the Circuit Court.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE DEFIANCE WATER COMPANY, Defendants. } No. 247.

This cause was heard and submitted to this court on the demurrer to plaintiff's reply to the answer of the defendant, The Defiance Water Company and was taken under advisement, and after due consideration and the court being fully advised is of the opinion the said demurrer is not well taken and should be disallowed. It is therefore considered that the said demurrer be and the same is hereby overruled, to which ruling in overruling the said demurrer the defendant, The Defiance Water Company here and now excepts.

And afterwards, to wit, on the 12th day of March, A. D. 1901, the following proceedings were had herein and entered on Journal 1, page 416, to wit:

321 In the Circuit Court of Defiance County, Ohio.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants. } Journal Entry.

WEDNESDAY, *March 12th*, 1901.

This day came the parties by their respective attorneys and this cause came on for hearing on the pleadings herein and the evidence adduced by the plaintiff and the defendant, The Defiance Water Company, and said cause was argued by counsel and submitted to the court and by the court was taken under advisement.

And afterwards, to wit, on the 15th day of March, A. D. 1901, the following motion for a new trial and rehearing was filed herein, to wit;—

In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company. } No. 247. Motion for a New Trial and Rehearing.

To said defendant, The Defiance Water Company, moves the court to grant a new trial and rehearing of this cause for the following reasons, to wit:

1st. The finding and decision of the court are contrary to law and are not sustained by sufficient evidence.

2nd. The court erred in the law in the admission of evidence given by the plaintiff and in its refusal to admit evidence offered to be given by the defendant, to which the defendant duly excepted at the time.

3d. There was irregularity in the proceedings of the court and in the order of the court in this, to wit: At the close of the defendant's case the plaintiff by its attorneys moved the court for judg-
322 ment in its favor, which the court then overruled and proceeded to hear evidence in support of the affirmative allegations set out in the reply and then after having taken the case under advisement, in its final decision allowed said motion of plaintiff without opportunity for argument of the same having been given this defendant, whereby this defendant was prevented from having a fair trial.

4. The court misapprehended and was mistaken in the law in allowing said motion of the plaintiff for judgment in its favor.

5. That by the allowance of said motion of plaintiffs for judgment after having once overruled it, this defendant's attorneys were taken by surprise which ordinary prudence could not have guarded against by reason of which they could not properly protect the rights of this defendant in the court at the time, to the prejudice of the defendant.

6. That fair opportunity was not given this defendant for its attorneys to argue the various legal questions arising out of the several rulings and orders of the court made against the defendants before the same were made, whereby this defendant was prejudiced.

HENRY & ROB'T NEWBEGIN,
Attorneys for the Defiance Water Company.

And afterwards, to wit, on the 15th day of March, A. D. 1901, the following proceedings were had herein and entered on Journal One page 419, to wit;

In the Circuit Court of Defiance County, Ohio.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE Defiance Water Company, Defendants.
} Journal Entry.

FRIDAY, *March 15th*, 1901.

323 This day again came the parties hereto in open court by their respective attorneys and the court coming now to announce its decision herein does find the equities of this case with the said plaintiff, and that the motion of the said plaintiff made at the time that said defendant rested its case for a finding and decree in favor of said plaintiff should have been allowed and that the said contract

of August 17th, 1887, attempted to be made and entered into by and between the city of Defiance and Samuel R. Bullock and Company, under which said defendant, The Defiance Water Company, claims and which is the contract and ordinance mentioned and referred to in the petition of said plaintiff, and the answer of said defendant water company, was and is unauthorized, in contravention of the law, prohibited, illegal and void and that the said council of the city of Defiance was without power or authority to make or enter into the same or to pay money to said water company under said contract, and that the payment of money for water under said contract would be a misapplication of the funds of the city, and that all such payments and the execution of said contract should be perpetually enjoined and that said plaintiff is entitled to the relief in the petition herein prayed for; and to recover its costs herein against said defendant, The Defiance Water Company and that said defendants should pay their own costs herein and this cause should be remanded to the court of common pleas for execution.

To each and all said findings and to said decision said defendant water company by its council then and there excepted; and filed its motion for a new trial and rehearing herein, which motion
324 the court overruled, to which ruling and order the said defendant company then and there excepted and prayed the court for a bill of exceptions herein, which the court granted and gave the statutory time for the preparation, allowance, signing and filing and making said bill part of the record herein.

It is therefore considered, adjudged and decreed that said defendants, The Council of the City of Defiance, Ohio, and The Defiance Water Company by and they hereby are perpetually enjoined from executing or carrying out said contract evidenced by said ordinance of August 17th, 1887, and the Council of the said City of Defiance by and hereby are perpetually enjoined and restrained from paying or taking and proceedings whatever towards the payment of any claims made by said water company at the time of the commencement of this action or any other or further claims of said water company for money for water furnished or to be furnished by it to said city under said contract.

It is further considered and adjudged that said plaintiff recover of said defendant, The Defiance Water Company its costs herein expended taxed to $— and that said defendants The Council of the City of Defiance and the said Defiance Water Company pay their own costs herein taxed to $— and execution is awarded therefor, and this cause is remanded to the court of common pleas for execution to all which orders, judgments and said decree said defendant The Defiance Water Company then and there excepted and now excepts.

And afterwards, to wit, on the 4th day of April, A. D. 1901, the following proceedings were had herein and entered on Journal 1, page 422, to wit:

325 In Vacation, April 4, 1901.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company.
} No. 247. Order Allowing Bill of Exceptions.

This day came the defendant The Defiance Water Company before the judges of the circuit court of said Defiance county, and presented to the said judges for allowance its bill of exceptions taken in this case at the March term, 1901, of said court and it appearing to the said judges that the said bill has been submitted to counsel for the plaintiff within forty days from the decision complained of by the said defendant and within forty days from the adjournment of the March term of the said circuit court, and that the same is now submitted to the said judges within forty-five days from the said time; and it further appearing to the said judges that the same is a true bill of exceptions, it is hereby on this 4th day of April, A. D. 1901, ordered that the said bill of exceptions be and the same hereby is allowed and signed by the said judges and ordered to be filed with the papers in the case and made a part of the record thereof, but not entered at large on the journal.

Clerk, enter,

CALEB N. NORRIS, *P. J.*

326 In the Circuit Court of Defiance County.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company.
} No. 247.

I, W. A. Schmaltz, clerk of courts, hereby certify that the above and foregoing is truly taken and correctly copied from the final record of this cause.

Witness my hand and official seal this 3rd day of May, A. D. 1901.

[SEAL.]

W. A. SCHMALTZ,
Clerk of Courts of Defiance County, Ohio.

THE STATE OF OHIO, *Defiance County,* } *ss:*

I, William H. Hubbard, presiding judge of the court of common pleas of Defiance county in the State of Ohio, do hereby certify that the foregoing attestation of W. A. Schmaltz, clerk of courts of Defiance county Ohio, is in due form and by the proper officer and that said W. A. Schmaltz, clerk of courts of Defiance county, Ohio, is the proper officer to make such copy and attestation.

In witness whereof I have hereunto set my hand as presiding

judge of the court of common pleas of Defiance county, in the State of Ohio, this 3rd day of May, A. D. 1901.

WILLIAM H. HUBBARD,
Judge of the Court of Common Pleas.

327 THE STATE OF OHIO, } ss:
Defiance County, }

I, W. A. Schmaltz, clerk of the court of common pleas of Defiance county, in the State of Ohio, do hereby certify that I am clerk of the court of common pleas of Defiance county, Ohio, and that William H. Hubbard is the presiding judge of the said court of common pleas of Defiance county, Ohio, duly elected, commissioned and qualified *and that the signature William H. Hubbard* hereinabove set forth is the genuine signature of said presiding judge, William H. Hubbard.

In witness whereof I have hereunto set my hand and affixed my official seal as clerk of the court of common pleas of Defiance county, Ohio, this 3rd day of May, A. D. 1901, at the city of Defiance, in said county of Defiance, in the State of Ohio.

[SEAL.]

W. A. SCHMALTZ,
Clerk of the Court of Common Pleas.

(Endorsement:) #1473. Defiance Water Co., *vs.* City of Defiance, O. Transcript from Defiance county, common pleas & circuit court. Filed, May 28, 1901, Irvin Belford, clerk.

328 It is hereby certified that on the last day of the sitting of the circuit court of Defiance county, at its March term, A. D. 1901, to wit, on March 15th, 1901, present; Hon. Geo. R. Haynes, presiding judge, Linn W. Hull and Robert S. Parker, judges of the said court, holding the court, the following entry appears on Journal 1, page 421 of the court, being the last entry made and entered thereon of said March term, 1901, to wit:

"Court adjourned *sine die.*"

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, at Defiance, Ohio, this 11th day of October, 1901.

[SEAL.]

W. A. SCHMALTZ,
Clerk of said Court,
By M. E. KISER, *Deputy.*

(Endorsement:) In circuit court of U. S. N. D. O. west'n div. Defiance Water Co., *vs.* City of Defiance and Council of City. No. 1473. Copy of adjournment *sine die* of March term 1901 of circuit court of Defiance county, Ohio. Filed, Oct. 28, 1901, Irvin Belford, clerk. H. & R. Newbegin, solicitors for compl'nt.

329 Circuit Court of United States, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE, OHIO, and THE COUNCIL OF the City, etc., Defendants in Error. } No. 1473.

Transcript of record of circuit court of Defiance county, Ohio, in case of The City of Defiance, by, etc., *vs.* The Defiance Water Co. *et al.*

Henry & Robert Newbegin, attorneys for plaintiff.
George T. Farrell, city solicitor, and Henry B. Harris, attorneys for the defendants.

Filed Oct. 28, 1901.

IRVIN BELFORD, *Clerk.*

330 Circuit Court of Defiance County.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE and THE Defiance Water Company, Defendants. } No. 247.

I, William A. Schmaltz, clerk of the circuit court, within and for the county of Defiance, State of Ohio, do hereby certify that the following is a true, full and correct transcript of the record, proceedings and original papers as they appear on the records and files of the said circuit court in my office in the above-entitled case.

Witness my hand and the seal of said court, this 25 day of October, A. D. 1901.

[SEAL.] W. A. SCHMALTZ, *Clerk.*

331 EXHIBIT "A."

Transcript of Docket and Journal Entries of Circuit Court.

THE STATE OF OHIO, *Defiance County,* } *ss.:*

In the Circuit Court.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants. } No. 247.

I, William A. Schmaltz, clerk of the circuit court within and for the county of Defiance, do hereby certify that the following entries and judgments are truly copies from the dockets and journals of

said court, to wit: on Journal 1, page 365, the following order is entered, to wit:

This day this cause came on to be heard upon the motion of the plaintiff to be permitted to file a complete and properly certified and sealed transcript of this cause herein, and the court being fully advised in the premises grants said motion, and leave is granted to said plaintiff to file such transcript which is accordingly done, this 14th day of March, 1899.

And afterwards, to wit, on the 15th day of March, A. D. 1899, the following proceedings were had herein and entered on Journal 1, page 366, to wit:

This day this cause came on to be heard on the motion to dismiss appeal for the reasons related in said motion and was argued by counsel and submitted to the court, and the court being fully advised finds that said motion is not well taken and, therefore, overrules said motion. And on application therefore leave is granted to file a correct and duly certified transcript of the docket and journal entries made in the common pleas court in this case, within thirty days from the rising of this court, and this cause is continued.

And afterwards, to wit, on the 25th day of October, A. D.
332 1899, the following proceedings were had herein and entered on Journal 1, page 374, to wit:

This 24th day of October, A. D. 1899, this cause came on for hearing upon the motion of the defendant, The Defiance Water Company, to dismiss the appeal. And the court upon the hearing of the said motion, are of the opinion that the undertaking given herein for appeal by the said plaintiff is insufficient in form and amount.

It is thereupon ordered and adjudged that the said plaintiff shall give a new undertaking for its appeal within twenty-four hours from this date, in the amount of one thousand dollars, with good and sufficient sureties, conditional according to law, to be approved by the clerk of this court.

And on this 25th day of October A. D. 1899, came the plaintiff and submitted to the court said new undertaking as required by the above order, and it appearing to the court that said new undertaking as to its form and amount is sufficient the same is approved and ordered to be filed in this case when the sureties thereon are approved by the clerk of this court and said bond is filed accordingly. Thereupon said motion to dismiss appeal is overruled. To which ruling, the defendant, The Defiance Water Company, then and there excepted.

And afterwards, to wit, on the 25th day of October, A. D. 1899, the following proceedings were had herein and entered on Journal 1, page 374, to wit:

This day came the parties hereto by their respective attorneys and this cause came on for hearing on the demurrer, of the defendant, The Defiance Water Company, to the petition of the plaintiff and was argued by counsel and submitted to the court and by the court taken under advisement.

And afterwards, to wit, on the 27th day of October, A. D. 1899, the following proceedings were had herein and entered on Journal 1, page 379, to wit:

This day came the parties to the above-entitled action by their respective attorneys and the court coming now to announce its opinion and judgment on the demurrer, heretofore submitted herein, finds that the said demurrer of the defendant, The Defiance Water Company to the petition of the said plaintiff is not well taken and that the same should be overruled and the same is according- overruled.

To which said finding and decision the said defendant, The Defiance Water Company, by its counsel, then and there excepted and now excepts.

333 Thereupon, the said plaintiff in open court asked leave to file an amended and supplemental petition, and the court being of the opinion that said application should be allowed it is ordered that the said plaintiff have leave to file an amended and supplemental petition herein, on or before December 1st, 1899, to the granting of which leave to amend petition and file a supplemental petition, The Defiance Water Company excepts, and the said defendant, The Defiance Water Company, has leave to plead thereto by the first Saturday in January, 1900, and this cause is continued.

And afterward, to wit, on the 13th day of March, A. D. 1900, the following proceedings were had herein and entered on Journal 1, page 389, to wit:

This day came the parties hereto, by their respective attorneys and this cause came on to be and was heard upon the motion of the defendant, The Defiance Water Company, to require the denials in the reply to be separated from the affirmative matter and to make the reply certain and definite and was argued and submitted by counsel and taken under advisement by the court.

And afterward, to wit, on the 14th day of March, 1900, the following proceedings were had herein and entered on Journal 1, page 391, to wit:

This day came the parties to the above-entitled action by their several and respective attorneys, and the court coming now to announce its opinion and ruling on the motion heretofore submitted herein, finds that said motion requiring plaintiff to separately state and number its causes, and to separate its denials from the affirmative matter is not well taken and is therefore overruled, and that said motion or so much thereof, requiring plaintiff to make its reply certain and definite by setting out the date of the alleged service is well taken and is therefore sustained and said plaintiff is granted leave to amend its reply by interlineation, which is accordingly done.

And afterward, to wit, on the 14th day of March, 1900, the following proceedings were had herein and entered on Journal 1, page 391, to wit:

Order Allowing Bill of Exceptions.

This day came the defendant, The Defiance Water Company, by its attorneys, and presented to the court its certain bill of exceptions this day taken in open court and prayed that the same might be allowed, which is hereby accordingly done, and it is further ordered that the same be and it is hereby made a part of the record
334 of this cause and ordered to be filed with the papers of the case, but not spread at large upon the journal of the court.

And afterward, and before the hearing of the demurrer of the said Defiance Water Company to the reply of the plaintiff herein the said defendant, The Defiance Water Company, objected to the jurisdiction of the court to hear or determine any of the issues raised in this cause for the reason that the said cause is now pending in the circuit court of the United States, for the northern district of Ohio, western division, the same having been improperly and illegally remanded to the court of common pleas of this county; but the court overruled the said objection to which the said defendant, The Defiance Water Company, duly excepted at the time and still excepts.

And afterward, to wit, on the 15th day of March, 1900, the following proceedings were had herein and entered on Journal 1, page 392, to wit:

This day this cause came on to be heard and submitted to the court upon the demurrer of the defendant, The Defiance Water Company, to the reply of plaintiff to the answer of said defendant water company, and cause is taken under advisement by the court.

And afterward, to wit, on the 16th day of March, A. D. 1900, the following proceedings were had herein and entered on Journal 1, page 396, to wit:

This cause is this day continued by order of court, for want of time to try.

And afterward, to wit, on the 23d day of October, A. D. 1900, the following proceedings were had herein and entered on Journal 1, page 404, to wit:

October 23, 1900, leave granted the plaintiff to supply petition instanter by filing certified copy of the same.

And afterward, to wit, on the 7th of November, A. D. 1900, the following proceedings were had herein and entered on Journal 1, page 412, to wit:

This cause was heard and submitted to the court on demurrer to plaintiff's reply to the answer of the defendant, The Defiance Water Company, and was taken under advisement; and after due consideration and the court being fully advised is of opinion the said de-

murrer is not well taken and should be disallowed. It is therefore considered that the said demurrer be and the same is hereby overruled. To which ruling in overruling the said demurrer the defendant, The Defiance Water Company, here now excepts.

335 And afterward, to wit, on the 12th day of March, A. D. 1901, the following proceedings were had herein and entered on Journal 1, page 416, to wit:

WEDNESDAY, *March* 12, 1901.

This day came the parties by their respective attorneys and this cause came on for hearing on the pleadings herein and the evidence adduced by the plaintiff and by the defendant, The Defiance Water Company, and said cause was argued by counsel and submitted to the court and by the court was taken under advisement.

The following entry appears on said Journal 1, page 419, as of date March 15, 1901.

In the Circuit Court of Defiance County, Ohio.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, Plaintiffs,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants.
} Journal Entry.

FRIDAY, *March* 15, 1901.

This day again came the parties hereto in open court by their respective attorneys and the court coming now to announce its decision herein does find the equities of this case with the said plaintiff, and that the motion of the said plaintiff made at the time that said defendant rested its case for a finding and decree in favor of said plaintiff should have been allowed and that the said contract of August 17, 1887, attempted to be made and entered into by and between the city of Defiance and Samuel R. Bullock and Company, under which said defendant, The Defiance Water Company, claims, and which is the contract and ordinance mentioned and referred to in the petition of said plaintiff, and the answer of said defendant water company was and is unauthorized, in contravention of law prohibited, illegal and void, and that said council of the city of Defiance was without power or authority to make or enter into the same or to pay money to said water company under said contract, and that the payment of money for water under said contract would be a misapplication of the funds of the city, and that all such payments and the execution of said contract should be perpetu-
336 ally enjoined and that said plaintiff is entitled to the relief in its petition herein prayed for; and to recover its costs herein against said defendant, The Defiance Water Company, and that said defendants should pay their own costs herein and this cause should be remanded to the court of common pleas for execution.

To each and all said findings and to said decision said defendant water company by its council (?) then and there excepted, and filed its motion for a new trial and rehearing herein, which motion the court overruled, to which ruling and order the said defendant company then and there excepted and prayed the court for a bill of exceptions herein, which the court granted and gave the statutory time for the preparation, signing, filing and making said bill part of the record herein.

It is therefore considered, adjudged and decreed, that the said defendants, The Council of the City of Defiance, Ohio, and The Defiance Water Company, be and they hereby are perpetually enjoined from executing or carrying out said contract evidenced by said ordinance of August 17th, 1887, and the Council of said City of Defiance be and hereby are perpetually enjoined and restrained from paying or taking any proceedings whatever towards the payment of any claims made by said water company at the time of the commencement of this action or any other or further claims of said water company for money for water furnished or to be furnished by it to said city under said contract.

It is further considered and adjudged that said plaintiff recover of said defendant, The Defiance Water Company, its costs herein expended taxed to $—, and that said defendants, The Council of the City of Defiance and said Defiance Water Company, pay their own costs herein taxed to $—, and execution is awarded therefor, and this cause is remanded to the court of common pleas for execution, to all which orders, judgments and said decrees said defendant, The Defiance Water Company, then and there excepted and now excepts.

This entry was indorsed as follows:

Clerk: Enter this on journal of circuit court as of date March 15, 1901. Caleb H. Norris, P. J., J. H. Day, W. T. Mooney.

337 And on the 4th day of April, A. D. 1901, the following proceedings were had herein and entered on Journal 1, page 422, to wit:

In Vacation, April 4th, 1901.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, *vs.* THE COUNCIL OF THE CITY OF DEFIANCE and The Defiance Water Company.	No. 247. Order Allowing Bill of Exceptions.

This day came the defendant, The Defiance Water Company, before the judges of the circuit court of Defiance county, and presented to the said judges for allowance its bill of exceptions taken in this case, at the March term, 1901, of said court, and it appearing to the said judges that the said bill has been submitted to counsel of the plaintiff within forty days from the decision complained of by the said defendant and within forty days from the adjournment of the

March term of the said circuit court, and that the same is now submitted to the said judges within forty-five days from said time; and it further appearing to the said judges that the same is a true bill of exceptions, it is hereby on this 4th day of April, A. D. 1901, ordered that said bill of exceptions be and the same is hereby allowed and signed by the said judges and ordered to be filed with the papers in the case and made a part of the record herein, but not entered at large on the journal.

Clerk: Enter Caleb H. Norris, P. J.

Transcript Appearance Docket 1, page 247.

Defiance Circuit Court.

Parties:

THE CITY OF DEFIANCE, OHIO, by EDWIN A. LATTY, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Company, Defendants.
} No. 247.

George T. Farrell, attorney for plaintiff.
H. & R. Newbegin, attorneys for defendant.

Transcript filed in circuit court Feb. 20, 1899.
Original papers filed in circuit court Feb. 20, 1899.
Appeal bond filed in circuit court Feb. 20, 1899.
338–416 Motion to dismiss appeal filed Mar. 14, 1899.
Motion to withdraw trans. and supply complete transcript filed Mar. 14, 1899.
Transcript refiled in circuit court Mar. 14, 1899.
Original papers refiled Mar. 14, 1899.
Appeal bond—motion to dismiss refiled Mar. 14, 1899.
Motion to withdraw, etc., refiled Mar. 14, 1899.
Motion filed Mar. 15, 1899.
March term. 1899, J. 1.—Motion to dismiss appeal overruled and leave granted pl'ff to file a complete transcript on or before 30 days from the rising of court & continued.
Transcript filed Apr. 6, 1899.
Motion to dismiss appeal filed Sept. 12, 1899.
Motion to dismiss appeal refiled as amended Oct. 16, 1899.
Bond filed Oct. 25, 1899.
October term, 1899, J. 1.—Bond found defective, new bond in the sum of one thousand dollars ordered filed.
Motion to dismiss appeal overruled, exceptions. Demurrer to pet. overruled, water Co. excepts, leave to pl't'ff to amend petition and file supplemental petition by Dec. 1, 1899. Leave to def't to plead by 1st Sat. in Jan., 1900, and continued.
Extension of time to plead filed Dec. 6, 1899. Pl't'ff, 2nd Sat. of Jan., 1900; def't 2nd Sat., Feb'y, 1900.
Answer of Defiance Water Co. filed Feb'y 10th, 1900.

Reply filed Feb'y 22, 1900.
Motion to require denials, etc., filed Mar. 3, 1900.
Demurrer filed Mar. 14, 1900.
Bill of exceptions filed Mar. 4, 1900.
Certified copy of original petition filed Oct. 23, A. D. 1900.
Motion for a new trial and rehearing filed Mar. 15, 1901.
Bill of exceptions filed April 4, A. D. 1901.
Mandate issued to the court of common pleas Apr. 26, 1901.

STATE OF OHIO, *Defiance County,* } ss:

I, W. A. Schmaltz, clerk of the circuit court in and for said county, do hereby certify that the foregoing is a true transcript of the appearance docket and journal entries of said court in the above-entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court on this 26th day of April, A. D. 1901.

[SEAL.] W. A. SCHMALTZ, *Clerk,*
By M. E. KISER,
Deputy Clerk.

* * * * * * *

417 Thereupon counsel for plaintiff, Mr. Harris, moved the court for judgment in favor of the plaintiff, on the ground that upon all the evidence and pleading before the court
418–431 the plaintiff is entitled to the same, and the same was argued by counsel.

Defendant's Exception.

Which motion the court then took under advisement and the court, being fully advised in the premises, made its finding in favor of said plaintiff, and that the plaintiff is entitled to judgment as moved for, to all of which the said defendant, The Defiance Water Company, then and there excepted.

The above and foregoing, together with the exhibits hereto attached, is all of the testimony and evidence, given or offered to be given in evidence by either or both of said parties upon the trial of said cause.

Thereupon came the said defendant, The Defiance Water Company, on the 4th day of April, A. D. 1901, and submitted this, its bill of exceptions, to the judges of said court, and prayed the court that the same might be allowed as a true bill of exceptions in said cause, and signed, sealed and made a part of the record. And it appearing to the court that the said bill of exceptions was duly presented to counsel for the plaintiff within forty days from the date of said trial and findings, the same is hereby allowed as prayed for

and ordered to be made part of the record herein, on the date last above named.

April 4, 1901.

CALEB H. NORRIS, [SEAL.]
—— ——, [SEAL.]
WILLIAM T. MOONEY, [SEAL.]
Judges of the Circuit Court within and for Defiance County, Ohio.

Filed May 25, 1901, in supreme court of Ohio.

J. B. ALLEN, *Clerk.*

* * * * * * *

432 *Notice to Take Depositions.*

STATE OF OHIO, *Defiance County,* } ss:

THE DEFIANCE WATER COMPANY, Plaintiff,
vs.
THE CITY OF DEFIANCE and THE Council of the City of Defiance, Defendants.

Case No. 1473, Pending in the Circuit Court of the United States, Northern District of Ohio, Western Division. In Equity.

The above-named defendants will take notice, that on Monday the 28th day of October A. D. 1901, the plaintiff above named will take the depositions of W. A. Schmaltz, M. E. Kiser, Henry Newbegin, and other sundry witnesses, to be used as evidence in the trial of the above cause, in behalf of the plaintiff at the clerk's office in the court-house in the city of Defiance, in the county of Defiance in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day and that the taking of the same will be adjourned from day to day, between the same hours until they are completed.

HENRY & ROBERT NEWBEGIN,
Attorneys for said Plaintiff.

Service of the above notice is acknowledged and proof of the official character — before whom the said depositions may be taken is by agreement waived; this 25th day of October A. D. 1901.

GEORGE T. FARRELL,
City Solicitor,
HARRIS, CAMERON & SHAW,
Of Counsel for Defendants,
Attorneys for Defendants.

433 Caption.

Deposition of W. A. Schmaltz, taken before me, F. L. Hay, a notary public within and for the county of Defiance, in the State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States for the northern district of Ohio, western division, in which The Defiance Water Company is plaintiff and The City of Defiance and The Council of the City of Defiance are defendants; Henry Newbegin being present on behalf of plaintiff, and George T. Farrell on behalf of defendant.

W. A. SCHMALTZ, of lawful age, being by me first duly cautioned and sworn deposes and says as follows:

434 Objection on behalf of the defendant on the taking of these depositions or any deposition at this time by the complainant, for the reason that the time within which these depositions should have been taken has expired.

Q. What office do you fill, Mr. Schmaltz?
A. Clerk of courts.
Q. And was you clerk of the circuit court of Defiance county, Ohio, at its March term 1901?
A. I was.
Q. Will you turn to the journal of that court containing the entries of the case for the March term named on page 419?
A. Yes sir, I have the page.
Q. That shows an entry there, does it not, of date March 15th?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant immaterial and not the best of evidence.

A. Yes sir.
Q. Is there an entry there on that page in the case of The City of Defiance by Edwin A. Latty, its solicitor, against The Council of the City of Defiance and The Defiance Water Company?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. Yes sir there is an entry on the journal in that case.
Q. Under what date?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. Of date of March 15th, 1901.
Q. Is there any other entry appearing on the journal of the court in that case of that term?

435 This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. Yes sir, there is.
Q. On what page is that?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. On page 416
Q. You may state now what entry last, in that case appears on the journal and the page?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. It is on page 419.
Q. Is all of that last entry on page 419, if not, give the page on which the whole of the entry is contained and completed?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. It does not all appear on page 419.
Q. It is completed on what page?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. It is completed on page 420.
Q. Now you may state, Mr. Schmlatz, from what source you received that entry?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. Well this entry was sent to me by the presiding judge, Norris, of the circuit court, mailed to me.
Q. When or what date did you actually receive it?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. I can't say.
436 Q. It was on or about the 25th day of April, 1901?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. It was about that time, the exact date I cannot give because I do not know.

Q. And when you received it from the presiding judge as you have stated, did it contain, was there any endorsements on it?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. There was.
Q. Can you state what other endorsements there was on it?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. On it was an order from the judges to enter on the journal as of date March 15th, 1901.
Q. Was that signed by any of the judges, if you remember?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. It was.
Q. By whom?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. As near as I recollect it the names of all three judges appeared.
Q. In their own handwriting?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. I can't say as to that. I am not familiar with it.
Q. It was in manuscript writing?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. Yes sir.
437 Q. Now you may state when that entry went on to the journal?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. I can't give that date.
Q. Well was it on or about the date it was received?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. It was the same day it was received.
Q. I ask you Mr. Schmaltz, I merely want you to explain how it

happens that if it was not actually entered until April 25th, it appears on the journal before other entries that were entered on page 421—that is there was a blank left to put it on?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. I did not put it on myself and I cannot answer the question whether there was a blank left there or not.

Q. Until this entry was made on page 419 and page 420 the space it now occupies was blank was it not?

This question objected to by counsel for defendant for the reason that it is incompetent, irrelevant, immaterial and not the best of evidence.

A. I do not know.

Here the plaintiff gave in evidence a certified copy of the entry, which is hereunto annexed, marked Exhibit "A."

No cross-examination.

W. A. SCHMALTZ.

438 EXHIBIT "A."

In the Circuit Court of Defiance County, Ohio.

FRIDAY, *March 15th*, 1901.

THE CITY OF DEFIANCE, OHIO, by EDWIN A. Latty, Its City Solicitor, Plaintiff,
vs.
THE COUNCIL OF THE CITY OF DEFIANCE, OHIO, and The Defiance Water Co., Defendants.
} Journal Entry.

This day again came the parties hereto in open court by their respective attorneys and the court coming now to announce its decision herein does find the equities of this case with the said plaintiff, and that the motion of the said plaintiff made at the time that said defendant rested its case for a finding and decree in favor of said plaintiff should have been allowed and that the said contract of August 17th 1887 attempted to be made and entered into by and between the City of Defiance and Samuel R. Bullock and Company, under which said defendant, The Defiance Water Company claims and which is the contract and ordinance mentioned and referred to in the petition of said plaintiff and the answer of said defendant water company was and is unauthorized in contravention of the law, prohibited, illegal and void and that the said council of the city of Defiance was without power or authority to make or enter into the same or to pay money to said water company under said contract, and that the payment of money for water under said contract would be a misapplication of the funds of the city, and that all such payments and the execution of said contract should be perpet-

ually enjoined and that said plaintiff is entitled to the relief
439 in its petition herein prayed for; and to recover its costs herein against said defendant The Defiance Water Company, and that said defendants should pay their own costs herein and this cause should be remanded to the court of common pleas for execution.

To each and all of said findings and to said decision said defendant water company, by its counsel, then and there excepted; and filed its motion for a new trial and rehearing herein, which motion the court overruled, to which ruling and order the said defendant company then and there excepted and prayed the court for a bill of exceptions herein which the court granted and gave the statutory time for the preparation, allowance, signing, filing and making said bill part of the record herein.

It is therefore considered adjudged and decreed that the said defendants, The Council of the City of Defiance, Ohio, and The Defiance Water Company, be and they hereby are perpetually enjoined from executing or carrying out said contract evidenced by said ordinance of August 17, 1887, and The Council of said City of Defiance be and hereby are perpetually enjoined and restrained from paying or taking any proceedings whatever towards the payment of any claims made by said water company at the time of the commencement of this action or any other or further claims of said water company for money or water furnished or to be furnished by it to said city under said contract.

It is further considered and adjudged that said plaintiff recover of said defendant, The Defiance Water Company, its costs herein expended taxed to $——, and that said defendants, The Council of the City of Defiance and the said Defiance Water Company pay their own costs herein taxed to $——, and execution is awarded therefor, and this cause is remanded to the court of common pleas for execution, to all which orders, judgments and said decree
440 said defendant, The Defiance Water Company, then and there excepted and now excepts.

This entry was endorsed as follows:

Clerk: Enter this on journal of circuit court as of date March 15, 1901. Caleb H. Norris, P. J. J. H. Day, W. T. Mooney. J. 1, page 419.

THE STATE OF OHIO, }
Defiance Co., } *ss:*

I, W. A. Schmaltz, clerk of the circuit court, within and for the county aforesaid, do hereby certify that the foregoing entry is the original entry furnished to me and ordered to be journalized as of March 15, 1901.

[SEAL.] W. A. SCHMALTZ.

Dated Oct. 26th, 1901.

W. A. SCHMALTZ, *Clerk.*

441 *Certificate.*

THE STATE OF ——, } ss:
Defiance County, }

I, F. L. Hay, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named W. A. Schmaltz, was by me first duly cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth, and carefully examined, and that the deposition by him subscribed as above set forth, was reduced to writing by Miss Harriet Blair, a stenographer, with the consent of the parties, and was subscribed by the said witness in my presence: That Exhibit "A" was attached to and made a part of said deposition in the presence of said witness, that said deposition was duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit, and was at the time of so taking the said deposition a notary public in and for Defiance county, Ohio.

In testimony whereof, I have hereunto set my hand and official seal, this 28th of October, A. D. 1901.

F. L. HAY,
[SEAL.] *Notary Public in and for Defiance County, Ohio.*

Cost Bill.

Writing and certifying depositions at 10c. per 100 words..... $2.00

Witness Fees.

W. A. Schmaltz..... 1.50

Total cost of taking depositions..... $3.50

Received of Henry Newbegin, counsel for complainant, the sum of $2.00 in full of my fees as above specified. The witness was paid his fees by Henry Newbegin, counsel as aforesaid.

F. L. HAY,
Notary Public.

442 (Endorsement:) 1473. Depositions taken in suit of The Defiance Water Company *vs.* The City of Defiance and The Council of the City of Defiance. These depositions taken, sealed up and directed to the said court by me. F. L. Hay, notary public. Opened by order of court and filed Oct. 29 1901. Irvin Belford, clerk.

443 123. *Defiance Circuit Court—Court Trial Docket, March Term, A. D. 1901.* 123.

No.	Attorneys.	Parties.	Action.	State of cause.
247	Geo. T. Farrell. H. & R. Newbegin.	The City of Defiance, Ohio, by E. A. Latty, its city solicitor, plaintiff, *vs.* The Council of the City of Defiance and The Defiance Water Co., defendants.	Appeal..... Filed Nov. 14, 1901, in supreme court of Ohio. J. B. Allen, clerk.	Transcript and all original papers filed Feb'y 20, A. D. 1899. Transcript and all original papers filed M'ch 14, A. D. 1899. Motion filed M'ch 3rd, A. D. 1900.

Remarks.

Sub. M'ch 14th, 1901.
" 15, Finding & judg't for pl'ff heard on ev. at close of def'ts' ev. Pl'ff's mo. for judg't sustained perpetual injunction allowed as prayed in pet. judg't accordingly costs adjudgt. ag'st the def't-. Judg't for costs. Ex. awarded & case remanded for execution. Def'ts' mo. for new trial overruled. D'f't excepts 50 days for bill of exceptions.

MOONEY.

444 THE STATE OF OHIO, } *ss:*
Defiance County, }

I, William A. Schmaltz, clerk of the courts of Defiance county, Ohio, do hereby certify that I am the clerk of the circuit court of Defiance county, Ohio, and as such am keeper and custodian of the records, journals, and dockets of said court and that the above and foregoing is a true transcript exemplification and copy of so much of the trial docket of said court as relates to the case of The City of Defiance Ohio, by Edward A. Latty, its city solicitor *vs.* The Council of the City of Defiance and The Defiance Water Company No. 247 in said court of the March 1901 term of said court and of the docket entries made by the said court in said cause on said docket.

In witness whereof I have hereunto set my hand and seal of my office at Defiance, Ohio this 12th day of October A. D. 1901.

[SEAL.] W. A. SCHMALTZ,
Clerk of the Circuit Court, Defiance, Ohio.

THE STATE OF OHIO, } *ss:*
Marion County, }

I, Caleb H. Norris, presiding judge of the circuit court of the third circuit of the State of Ohio, which circuit includes the county of Defiance, do hereby certify that the foregoing attestation of W. A.

Schmaltz, clerk of courts of Defiance county, Ohio, is in due form and by the proper officer, and that said W. A. Schmaltz, clerk of courts, of Defiance county Ohio is *ex officio* clerk of the circuit court of said Defiance county, Ohio which is one of the circuit courts of said third circuit, of which I am presiding judge.

In witness whereof I have hereunto set my hand as pre-
445 siding judge of the circuit court of Defiance county, in the State of Ohio, this tenth day of November, A. D. 1901.

CALEB H. NORRIS,
Presiding Judge of the Circuit Court of the 3rd Judicial Circuit of the State of Ohio.

THE STATE OF OHIO, *Defiance County,* } *ss:*

I, W. A. Schmaltz, clerk of the circuit court of Defiance county, Ohio do hereby certify that I am clerk of courts, of Defiance county, Ohio and as such *ex officio* clerk of the circuit court of said county and that Caleb H. Norris is the presiding judge of said circuit court, whose official title as such is judge of the circuit court of the third circuit of the State of Ohio, and he is duly elected, commissioned, qualified and acting as such judge, and that the signature, Caleb H. Norris, hereinabove set forth is the genuine signature of said presiding judge, Caleb H. Norris.

In witness whereof I have hereunto set my hand and affixed my official seal as clerk of the circuit court of Defiance county, Ohio this 11th day of November, A. D. 1901, at the city of Defiance, in said county of Defiance, in the State of Ohio.

W. A. SCHMALTZ,
[SEAL.] *Clerk of the Circuit Court of Defiance County, Ohio.*

(Endorsement:) 1473. In the circuit court of the United States northern district of Ohio, W. D. The Defiance Water Company *vs.* The City of Defiance and The Council of the City of Defiance. Certified copy of trial docket and entries of Defiance county, Ohio, circuit court. Filed Nov. 19, 1901. Irvin Belford, clerk. Evidence on behalf of defendants.

446 United States Circuit Court, Northern District of Ohio, Western Division.

THE DEFIANCE WATER COMPANY
vs.
THE CITY OF DEFIANCE and THE COUNCIL of the City of Defiance. } No. 1473. In Equity.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of the original pleadings, records, papers, and exhibits filed in said cause, and so much of complainant's proofs

filed therein as were offered in evidence at the trial of said cause and rejected by the court, and all other proceedings in said cause that I am advised by counsel are necessary to the hearing in the Supreme Court of the United States.

And I further certify that the testimony, and evidence from page 176 to page 246 inclusive of said record are the proofs of the complainant offered to be given in evidence upon the general issue formed by the bill as amended, the supplemental bill, answer and replication thereto, and also as to those issues, to which the complainant contended the special plea did not reach and which the court refused to receive or hear in evidence.

I further certify that pages 329 to 431 inclusive of this transcript *is* a copy of the transcript of the record and proceedings of the circuit court of Defiance county, Ohio, offered in evidence by the complainant, and rejected by the court.

That so much of the record as is embraced in pages 432 to 440 inclusive, is a copy of the deposition of W. A. Schmaltz, offered in evidence by the complainant and rejected by the court, and that on page 328 is a copy of the transcript of the adjournment *sine die*, of the March term A. D. 1901, of the circuit court of Defiance county, Ohio, offered in evidence by the complainant and rejected by the court.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Toledo, in said district, on this 24th day of February, A. D. 1902, and the 126th year of the Independence of the United States of America.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD,
Clerk of the United States Circuit Court,
Northern District of Ohio.

447 In the Supreme Court of the United States.

THE DEFIANCE WATER COMPANY, Appellant,
vs.
THE CITY OF DEFIANCE ET AL., Appellees.

No. 573, October Term, 1901. Statement for Printing Record.

To the clerk of said court:

The appellant intends to rely upon all of the errors set out in its assignment of errors.

Said appellant deems necessary for the consideration thereof the following parts of the record, which you will please cause to be printed, to wit: the whole of the record herein, except omit so much of pages 329 to 431 thereof, being the printed transcript of the record of the circuit court of Defiance county, Ohio, offered as evidence by the complainant, as is comprised within the original pages of the said printed transcript 21 to 99 inclusive, and omit all but the last paragraph of original page 100 and all of original page 101 after

and including the words "Exhibit A" thereon, and omit all of original pages of said printed transcript 102 to 114 inclusive. The last paragraph of original page 100 beginning with the words "Thereupon counsel for the plaintiff," and all of page 101 of said transcript down to, but not including, the words "Exhibit A," are to be printed.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Attorneys for said Appellant.

448 THE STATE OF OHIO, }
Defiance County, } *ss:*

Robert Newbegin, being first duly sworn, says that he this day served the within upon the appellees by leaving a true copy thereof with Mr. H. B. Harris, one of the counsel of the appellees.

ROBERT NEWBEGIN.

Sworn to before me and in my presence subscribed, this 25th day of April, A. D. 1902.

[NOTARIAL SEAL.]

E. J. PHELPS,
Notary Public.

[Endorsed:] Supreme Court of the United States. No. 573. Defiance Water Co. *vs.* City of Defiance *et al.* Precipe for printing record. By Henry Newbegin & Robert Newbegin, appellant's counsel.

449 [Endorsed:] File No. 18,426. Supreme Court U. S. October term, 1902. Term No. 257 The Defiance Water Co., app't, *vs.* The City of Defiance *et al.* Statement by appellant of errors relied upon and designation of parts of record to be printed & proof of service of same. Filed April 28th, 1902.

Endorsed on cover: File No. 18,426. N. Ohio C. C. U. S. Term No. 257. The Defiance Water Company, appellant, *vs.* The City of Defiance and The Council of the City of Defiance. Filed February 27", 1902.

FILE COPY.

263

SUPREME COURT OF THE UNITED STATES.

Office Supreme Court U. S.
FILED
APR 4 1903
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1902.

THE DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE ET AL.,
Appellees.

No. 252. 21

BRIEF FOR APPELLANT.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Solicitors for Appellant.

ROBERT W. BINGHAM,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 257.

THE DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE,
Appellees.

Brief for Appellant.

STATEMENT OF THE CASE.

This is a suit in equity brought in the Circuit Court of the United States for the Northern District of Ohio, Western Division, by the appellant, by its bill filed therein on the 24th day of June, A. D. 1898. The object and prayer of the bill was to prohibit the appellees, the defendants below, from repudiating and abrogating a certain contract entered into by the defendants with the complainant's assignors, Samuel R. Bullock & Company, on the 17th day of August, A. D. 1887, by ordinance of the city of that date, for renting certain hydrants of the Water Company for fire protection and other purposes.

It is alleged in the bill and amendment thereto, that the Defiance Water Company, a corporation of Ohio, was organized for the purpose of operating water works in the said city of Defiance; that on said 17th day of August, an ordinance was passed by the city council, entitled:

"An ordinance to authorize and provide for the construction and maintenance of a system of water works in the city of Defiance, Defiance county, Ohio."

A copy of the ordinance was annexed to the bill as exhibit "A" (see printed record, pp. 11–18).

That thereby the right and privilege was granted for thirty years thereafter, to Samuel R. Bullock & Company, their successors and assigns, of locating and operating a system of water works in said city and in consideration of the public benefit to be derived therefrom, of using the streets of the city for the purpose of placing their pipes, conduits and hydrants therein. (Sec. 1.)

That by said ordinance the city rented of Samuel R. Bullock & Company, their successors and assigns, 130 water hydrants at $40 per annum, payable semi-annually on the first days of January and July of each year, and such other hydrants as it wished, to be constructed by said Bullock & Co. or its assigns on demand of the city, at the rate of $30 each, per annum, for the unexpired portion of said thirty years, payable as aforesaid. The water through said hydrants was to be used for extinguishing fires, fire practice, sanitary purposes, washing out of gutters, etc., under control of the city council and the superintendent of the water works. (Sec. 3.) The Water Company was to furnish free, water for the schools of the city, the cemetery, public buildings then erected or thereafter erected during the term and for public fountains. (Sec. 4.) Bullock & Company were to organize a corporation under the laws of Ohio, and were authorized to assign to it all their rights under the ordinance. (Sec. 5.)

That Bullock & Co. or assigns should submit the water works to a certain test on the performance of which the city agreed formally to accept the works (Sec. 6); that they (Bullock & Co. and assigns) were required to and did file a written acceptance of said ordinance, and give bond in the sum of $5,000 for their compliance with the terms of said contract and ordinance. (Sec. 7.)

The ordinance provided that Bullock & Co. and assigns should make extensions of their water mains whenever required by the city council. (Sec. 10.)

That it was further provided in said contract that the said city, at the expiration of ten years after the ordinance took effect, and at the expiration of any five years thereafter, should have the right to purchase the waterworks, upon certain terms named. (Sec. 9.)

It is then alleged in substance in the bill (Record, pp. 5 and 6) and in the amendment thereto (Record, pp. 25 and 26, to be inserted in the bill at end of first paragraph, p 6), that during the fall or winter of 1887, Bullock & Co. became largely involved in indebtedness, for material furnished and moneys loaned for the construction of said water works, in the sum total of about $150,000, and that their creditors were about to levy attachments on the works and material, so that said Bullock & Co. were unable to complete the said water works and comply with their contract with the city; when by the agreement of all the parties in interest, with the consent and knowledge of the said city, said Bullock & Co. assigned and transferred to the Defiance Water Company (the complainant), a corporation that had been organized for the purpose, all their right and interest in and to the said water works and property and contract with the said city, said creditors taking each an amount of stock in the corporation in proportionate to the several amounts due them from Bullock & Co. That said creditors took the assignment of the interest of said Bullock & Co. in the said property and water works and in the said contract with the city at the special instance and request of the said city, made by its council; and the said city council specially requested the said creditors to complete the construction of said water works.

That relying on the representations of the said city, made through its council, and the promise and agreement of the city to pay for the water furnished it, "said Defiance Water Company went on and completed the construction of the said water works in accordance with the terms of said ordinance and said contract with the said city of Defiance, to the entire satisfaction of said city and its council, so that the said water works stood and performed the test above set forth and required by the said city council; and the same were, by resolution of the said city council, passed on the 5th day of March, A. D. 1889, accepted." (Rec. p. 6. A copy of the resolution of acceptance is attached to the bill as Ex. B., Rec. p. 18.)

It is alleged in the bill that the actual cost of the construction of the water works and the extension of the mains and hydrants was $196,000, for which the bonds of the company secured by mortgage on all of its property, were issued, and taken by said creditors in discharge of their claims; that said creditors completed the construction of said water works and took said bonds in satisfaction of their

claims in full faith that the city would comply with its contract for the use of water and they relied on the revenue to be derived from the rental of the hydrants to the city for any remuneration for their money so invested, and that the water company has no other means of paying any part of the interest on said bonds than the rental of said hydrants to the city; that the total revenue of the water company from all other sources is insufficient to meet the expenses of the operation of the works and that the net annual revenue from the operation of the works, including the annual rentals of the hydrants to the city under the contract is insufficient to pay more than two and one-half per cent interest on the bonds.

It is further alleged that from time to time down to July 1, 1895, on order of the city, the complainant had extended its mains and constructed additional hydrants, to the number of thirty-one, which had been used since that time by the city at an annual rental of $35 each. (And see amendment to bill, record page 26.) That from the time of the construction of said water works and hydrants to the present the city has used the same, under its contract, and the complainant has furnished water by means of the same to the city for the purposes named in the contract, and is still so furnishing all the water required by the terms of the contract and the city has paid semi-annually the rents accruing therefor down to July 1, 1897, and that from the time of the completion of said water works and the construction of said hydrants the city has had the entire control and possession of the said 161 hydrants, has made use of them as the sole means of extinguishing fires, is still using the same and still has entire possession and control of them. That the complainant, as the assignee of said Bullock & Co., has fully complied with all the conditions of said ordinance and contract on its part; that on January 1, 1898, there was due and owing from the city of Defiance to the complainant for water rent for said hydrants for the last half of the year 1897, the sum of $3,142.50 and (amd. to bill, record, p. 26) there would become due and payable, at the end of each six months thereafter during the term of said contract, the like sum of $3,142.50.

It is alleged in the bill and amendments, that notwithstanding the foregoing the city council of Defiance on January 7, 1896, without any prior or subsequent notice thereof given to the complainant, passed an ordinance or resolu-

tion rescinding and annulling the said contract of the city with the complainant; this resolution is as follows:

"Whereas the Defiance Water Company have submitted a bill to the city council for $3,160 alleged to be due them from the said city for water rental for the past six months:

And whereas, said council are of the opinion that no water contract exists or is between said city and said company for the payment of the same; and furthermore that said bill is, in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity:

And whereas, the best interest of the city in their opinion demands that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to the said city upon fair and equitable terms.

Therefore be it resolved, that the city clerk is hereby directed forthwith to draw his warrant on the city treasurer against the water fund of said city for the sum of $3,160 in favor of said Defiance Water Company in full payment of said bill; provided, however, that if said warrant be accepted by said company, it be taken and accepted by them without in any manner being construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to the said company." (See exhibit A to plea, Rec. pp. 48 & 49.)

It is further alleged, that the said city council and its several members, ever since the passage of the resolution of January 7, 1896, repeatedly stated and gave out to the public that the city had no contract as aforesaid with the water company, and that they passed resolutions and ordinances looking toward the construction of water works by the said city for furnishing water to it and its citizens, and to supercede the complainants service, notwithstanding that the city had not given any notice to the complainant and had never offered to purchase the complainant's water works, as provided by the said contract; and by that means and the general denial that the complainant had a contract the defendants induced many of the consumers of water to abandon its use and thereby largely depreciated and were depreciating the value of the complainant's property. (See Rec. p. 8 and amendment, bottom of p. 26, and exhibits B and C to defendants' plea, pp. 49 and 50.)

It is further alleged in the bill (Rec. p. 8), that the said city council requested the city solicitor of said city and combined, colluded, and confederated with him to bring suit in the Court of Common Pleas of Defiance County, in the name of the said city against the said city council, (see Rec., p. 147) and that suit was therein brought by the said solicitor in the name of the city through and by the procurement of the said council, to have themselves enjoined from paying the complainant the said sum of $3,142.50 due January 1, 1898, for hydrant rentals for the last half of the year 1897; that the object and prayer of the petition in said suit was to perpetually enjoin the said council from paying any water-rents that had accrued to the complainant in the past, especially said $3,142.50, as well as for water to be furnished the city in the future under said contract. The petition in this suit was filed in the said Court of Common Pleas on the 4th day of January, 1898, and on the same day a temporary injunction, as prayed for in the petition, was allowed by the Probate judge, (the judge of the Court of Common Pleas being absent from the county) and served. The complainant was named as a defendant in the suit, though no relief whatever was asked against it, (the full substance of the petition and the prayer and copy of the order of injunction allowed appear in the bill, Rec. pp. 2 and 3.)

It is further alleged in the bill that application was made to the council to assist in the defense of the suit, and that they refused; that having enjoyed all the benefits of the contract, and having stood by and seen the complainant expend large sums of money in the construction of its water works the city is now estopped from denying the existence of the contract, and from refusing to pay for the use of water under it; that the effect of the said injunction, if it stood and was made perpetual, would be to deprive the complainant of its property without due process of law, and that the passage of the said ordinances and resolutions by the city council were an abrogation of the contract, and that they are laws impairing the obligation of the said contract, contrary to the provisions of the Constitution of the United States. The prayer of the bill is that the defendants may be enjoined from denying the existence of the said contract and from attempting to abrogate or annul it, and that an account may be taken of the water rents due the complainants and for the use of its hydrants in the past and pending suits.

(See bill and exhibits, record pp. 1–20, and amendments, pp. 25–27.)

To this bill and amendments the defendants filed separate demurrers, which were overruled by the court (Judge Severens sitting), on the 30th of December, 1898, the court retaining jurisdiction of the suit and holding that the said contract "was valid for twenty years from its date." (See Rec., pp. 29–32, and 90 Fed. Rep. 753.)

On the 16th day of January, 1899, the Court of Common Pleas of Defiance County decided the said suit of the City of Defiance, by its solicitor, vs. The Council and the Water Co. against the city and rendered final judgment therein, dismissing the plaintiff's petition and by leave of the court the complainant on January 24, 1899, filed a supplemental bill in this suit setting up the final judgment of the said Court of Common Pleas, and further alleging therein that it had presented its account for accrued water rentals to date, to the city council for allowance and payment and that they refused to consider it. (See Rec., pp. 33–36.)

On February 25, 1899, the defendants filed what they designate as a "joint and several plea" and an answer in support of it. (Rec., pp. 36–55.) On argument this was held insufficient by the court. (Rec., p. 55.)

Answer was then filed by the defendants, May 1, 1899. (Rec., pp. 56–78.)

In their answer the defendants, in substance, admit, that the contract and ordinance set out in the bill (Exhibit A) was entered into and passed by the city council; but they aver it "was never submitted for ratification to a vote of the electors of the city." (Rec., pp. 56–61.)

They admit that said Bullock & Co. filed with the city clerk their written acceptance of the ordinance and gave bond for their compliance with its conditions. (Rec., p. 60.)

They admit that the suit was brought, in the Court of Common Pleas of Defiance County, by the city solicitor, to enjoin the council from paying any and all claims of the complainant for the accrued water rents, substantially as alleged in the bill. (Rec., pp. 56, 57).

They admit, in substance, that the complainant corporation was organized for the purpose of operating water works in said city and supplying the city and its citizens with water. (Rec., p. 57.)

They admit that the city council accepted the water works of the complainant, March 5, 1889. (Rec., p. 59.)

They admit that after the completion of the water works thirty additional hydrants were put in by the complainant at the request of the city; that the city paid the com-

plainant, from time to time, the full amount falling due for hydrant rentals, named in the said ordinance of 1887, down to January 1, 1898, (except the $500 not in dispute) and admit that the city used the hydrants for fire and water purposes; they do not deny that it is still using them, nor do they deny having possession and control of them, they deny only the *entire* possession. (Rec. p. 60.)

They *aver* that the construction of the water works system was by the complainant or the successors and assigns of said Bullock & Co. (Rec. p. 61.)

They admit, in substance, that the said defendants have denied the validity of the said contract. (Rec. p. 61.)

They admit that the city did not elect to purchase the complainant's water works, under the terms of the contract, and, in substance, admit the complainant's charge in the bill that they passed resolutions and ordinances looking toward the construction of the water works by the city. (Rec. p. 63 and bill p. 8.)

To the answer replication, in the usual form, was filed by the complainant. (Rec. p. 80.)

On January 9, 1900, the defendants filed in the Circuit Court a paper, called a motion, to stay further proceedings in the case until the disposition of the suit in the State courts, brought by the city solicitor to enjoin the council from paying the complainant its hydrant rentals, which suit they stated in the motion had been appealed to the Circuit Court of said Defiance County and was then pending therein. (Rec. pp. 80–84.)

This motion was overruled by the court (Judge Severens, circuit judge) March 17, 1900. (Rec. pp. 84 and 85 and 100 Fed. Rep. 178.)

Rule was then entered for the taking of testimony, to be completed by the 21st day of May, 1900. (Rec. pp. 85, 86.) Under this rule proofs were filed in support of the general issues, by both of the parties to the suit.

On May 28, 1901, application was made by the defendants to the Hon. Francis J. Wing, district judge, for leave to file a supplemental answer in the case and to plead therein the decision of the Circuit Court of Defiance County, on appeal of the injunction suit of the city against the council and the Water Company, and for leave to file a transcript of the record of the said Circuit Court in support of their application. (Rec. p. 87.) This motion in substance was allowed *on June 17, 1901*, the court ordering the paper to be filed as a "plea" instead of "supplemental

answer and amendment to original answer." The complainant excepted to this order of the court. (Rec., p. 96, motion and paper proposed to be filed, pp. 87 and 89-95 and opinion of Judge Wing, p. 88.)

On argument upon the sufficiency of this supplemental plea, the same was held by the court sufficient in law. (Rec. p. 96.)

To this supplemental plea the complainant then filed the usual replication in equity, and rule was entered to take testimony on the issue thereby formed. (Rec., p. 97.)

The case came on for final hearing at the December term of the court, December 21, 1901, when the court ruled that the case would be for hearing on the said supplemental plea filed June 17, 1901. To this ruling of the court the complainant objected, and moved the court to hear the cause upon the general issues made in the case and offered in support thereof, to give in evidence its proofs filed therein; this request was overruled by the court and the complainant excepted. (Rec., p. 98.)

Thereupon the complainant moved the court to hear the cause upon all the issues made in the case, including that of the said plea, which request the court refused, and the complainant excepted. (Rec. p. 98.)

Thereupon the defendants in support of their said plea offered in evidence the transcript from the record of the Circuit Court of Defiance County, in the said case of The City of Defiance, by its solicitors, vs. The said Council and the Defiance Water Co., with the certificates thereunto attached, filed in the court on *May 28th*, 1901, which case was then pending in the Supreme Court of Ohio (Rec., p. 204); to the receiving this in evidence the complainant, by its counsel, objected, on the ground that it does not purport to be and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case. "To the ruling of the court admitting this in evidence the complainants excepted. (Rec., pp. 98, 99 and 148-195. The clerk's certificate to this transcript is on page 194 and the date of filing "May 28th," is at the end, middle of page 195.) This was all the evidence offered by the defendants in support of their said plea. (Rec., p. 99.)

Thereupon the complainant offered in evidence on the said issue its proof on said plea: *First*, a transcript of the record and proceedings of the said Circuit Court of Defiance County in the said case, which the court refused to receive (Rec. p. 99; see clerk's certificate to this transcript,

Rec. p. 196); *second*, the deposition of W. A. Schmaltz, clerk of said Circuit Court of Defiance County, which the court refused to receive in evidence. (Rec. pp. 99 and 205–209); *third*, a certified transcript of the record of the adjournment of the March term, 1901, of the said Circuit Court of Defiance County; which the court refused to receive in evidence. (Rec. pp. 99 and 195.) The court held that the said supplemental plea ought to be sustained, and the complainant excepted. (Rec. p. 99; and see certificate of Clerk Belford to transcript of record, paragraphs 3 and 4, page 213 of printed record, and pp. 195 to 209 of printed record.)

The complainant then "moved the court to hear the cause upon the issues formed by the bill as amended, the supplemental bill, the answer and the replication thereto, on the ground that the said plea does not reach the whole of said issues, and that as to them said plea ought not in law and in equity to avail the defendants; and the complainant offered to give in evidence its proofs on file in support of said issues; but the court refused the said request and held that said plea extended to and was conclusive of all the said issues." To this ruling the complainant, by its counsel, excepted. (Rec. p. 99, seeclerk Belford's certificate to transcript, paragraph 2, p. 213 of printed record, and printed record pp. 104 to 147.)

The court then dismissed the complainant's suit and final decree was rendered for the defendants, and exception taken by the complainant. (Rec. p. 100.)

From this decree an appeal has been taken to this court.

Assignment of Errors.

The assignments of error made by the complainant, in praying for its appeal appear on pages 100–102 of the printed record and are in substance as follows:

1st. That the Circuit Court erred in its order of June 17, 1901, in allowing the defendants to file said supplemental plea and with it the record of the State court.

2d. The said court erred in holding said plea sufficient in law.

3d. The court erred in refusing to hear the cause on the general issues and the proofs offered by the complainant.

4th. The court erred in refusing to hear the cause upon all the issues made in the case including the said plea and the proofs offered by the complainant.

5th. The court erred in receiving in evidence the transcript of the record of the Circuit Court of Defiance County, in the case named.

6th. The court erred in refusing to receive in evidence on the issue made by the said plea and the replication thereto the whole or any part of the proofs offered by the complainant. (Under this the assignments are made specific, record pages 101, 102.)

7th. The court erred in holding that said plea ought to be sustained.

8th. The court erred in refusing to hear the cause upon the issues to which the said plea did not reach and the proofs in support of the same.

9th. The court erred in holding that the said plea extended to the whole of said issues and was conclusive of the same.

10th. The court erred in its final decree dismissing said suit with costs to defendants.

The complainant has filed in this court, and the same are printed in the record, its proofs on the general issues taken and filed in the Circuit Court, prior to the filing of the supplemental plea, pages 104–148 of the printed record, being pages 177 to 246, inclusive of the original transcript filed in this court. See clerk Belford's certificate to transcript. (Rec. p. 213.)

ARGUMENT.

I.

THE CIRCUIT COURT SHOULD NOT HAVE PERMITTED THE SUPPLEMENTAL PLEA TO BE FILED (called by defendants "supplemental answer and amendment to original answer." See motion, opinion of the court, supplemental plea and order allowing motion, record pages 87–96).

First: **Such a plea *in bar* of the suit is not known in equity practice. If competent to have permitted the paper to be filed, it should have been filed as defendant's counsel first attempted, as a supplemental *answer*.**

Beach Eq. Prac., Sec. 423.

But any matter *de hors* the record though occurring pending suit should have been pleaded in a cross-bill.

At hearing in the Circuit Court, counsel for the defendants relied on Sec. 154 Foster's Fed. Practice in support of their right to file their supplemental defense. Foster again refers to this matter in the last paragraph of section 171. The authorities cited by him under both sections do not support the text. Neither in *Kelsey* v. *Hobby*, 16 Pet. 277, nor in *Coburn* v. *Cedar, etc., Co.*, 138 U. S. 196, 222, was the question involved or decided. In *Suydam* v. *Truesdale*, 6 McLean, 459, the application was refused; *E. A. Co.* v. *Brush El. Co.*, 44 Fed. Rep. 602, 607, related to a supplemental *bill*; while it is expressly held in *Banque Franco-Egyptienne* v. *Brown*, 24 Fed. 107, by Judge Wallace, that "the correct practice requires" such matters to be set up "by means of a cross-bill" and not by way of a supplemental answer.

And see Story's Eq. Pl., Sec. 393.

Second: The same question in substance had been passed on twice before in the same court, once by Judge Severens on what the defendants call a "Motion to stay proceedings." (Rec., pp. 80–85; 100 Fed. Rep. 178), and again by Judge Wanty on a similar application. The motion and order of Judge Wanty seem to be omitted from the record, but the decision is referred to by Judge Wing in his opinion Rec., p. 88.

Third: **"To make a matter *res adjudicata*, there must be a concurrence—1. Of identity of the subject-matter; 2. Of the cause of action; 3. Of person and parties; and 4. In the quality of the persons for or against whom the claim is made."**

Freeman on Judgments, 4th Ed., Sec. 252.

And it must appear in the plea, that the same issue was joined in the former suit, as in the bill, and that the proceedings were for the same object and purpose.

Story's Eq. Pl., 9th Ed., Sec. 780a, last par.

(1.) The parties here are not the same. The suit in the State court being by the city against the council, the Water Company being merely nominal. No relief whatever is prayed for against the Water Company in the petition in the State court, and the real defendant there, the city council, admits in its supplemental plea that it made no defense, but avers that "the council of the city of Defiance failed to answer or demur to the said petition of said plaintiff in said action in said State court." (Rec. p. 93.)

(2.) The subject-matter of the two suits is not the same. The suit in the State court being to enjoin the council from paying anything on the alleged illegal contract; while in the suit here the Water Company seeks not only to enforce the contract but also to collect the value of its water used by the city, whether the contract may be held legal or otherwise.

It appears from the record, the original bill filed in this suit, the defendants' supplemental plea, and the pleadings in the State Circuit Court filed by the defendants in support of their plea that the complainant could not have the relief in the State court prayed for by it in its bill here. In the suit in the State court the city merely prays for an injunction to restrain the council from paying the Water Company its hydrant rentals. The Water Company in its defense denies only the right of the city to such relief, while in its bill in this suit it not only seeks to prohibit the defendants from denying the validity of its contract and to enforce it, but it also prays for an accounting for the water used by the city before and pending suit.

(See supplemental plea, Rec. pp. 89–94; transcript filed in support of the plea, petition pp. 148–150; demurrer to petition and judgment of the Court of Common Pleas on same, pp. 157, 158; answer of the water company in the Circuit Court of Defiance County, pp. 166–174, especially last paragraph and prayer of the answer, p. 174; original bill herein, (Rec. pp. 1–10 and amendments, pp. 25–27, especially next amendment to last, p. 26; and prayer for relief, p. 10).

Not only was no affirmative relief asked for in the State courts, but in the nature of the suit the State Circuit Court had no jurisdiction to afford it. The Circuit Court took the case by appeal from the Court of Common Pleas, and the case was necessarily tried on appeal upon the issues made in the Court of Common Pleas. The claim of the Water Company not having been set up in the Court of Common Pleas, the Circuit Court had no original jurisdiction of it.

Section 6 of Art. IV of the Constitution of Ohio provides that "the Circuit Court shall have * * * such appellate jurisdiction as may be provided by law." Section 5226 of the Revised Statutes of Ohio provides than "an appeal may be taken to the Circuit Corrt * * * from a judgment * * * rendered by the Common Pleas Court * * * if the right to demand a jury therein did not exist," and section 5225 provides that the trial in the Circuit Court "shall be conducted in the same manner as in the Common Pleas Court, and upon the same pleadings."

And see:

Grant v. *Ludlow's Adm'r*, 8 O. St. *32*.

Wilson v. *Wilson*, 30 O. St. 365.

Bickett v. *Garner*, 21 O. St. 659.

Witte v. *Lockwood*, 39 O. St. 141.

(3.) The capacity in which the parties sue is different; in the State court the city sued *by its city solicitor* in right of the people, not in its own right; it is really the suit of the people through the city.

Rev. St. of Ohio, Sections 1777 and 1778.

Jones et al. v. *Kilbreth*, 49 O. St. 401.

Laggott v. *Great Northern Ry. Co.*, 1 Q. B. D. 599.

The parties must be adversary in both suits.

McCrory v. *Parks*, 18 O. St. 1, 2d prop. syl. and pp. 7, 8.

Graham v. *Railroad Company*, 3 Wall. 704.

Generally on this third point we cite the following:

The Lessee of Lore v. *Truman*, 10 O. St. 45.

The first proposition of the syllabus is as follows:

"Where a judgment or decree is relied on by way of evidence, as conclusive *per se* between the parties in a subsequent suit, it must appear by the record of the former suit, that the particular controversy sought to be precluded was therein *necessarily* tried and determined;" and see opinion, pp. *54–56*.

In *Cromwell* v. *County of Sac*, 94 U. S. 351, in the opinion of the court on page 352, Mr. Justice Field says:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon its merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Further on page 353:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

This case is followed in

Nesbitt v. *Riverside Independent District*, 144 U. S. 610,

and in

Roberts v. *Northern Pacific R. R. Co.*, 158 U. S. 1, *27–29*.

In *McComb* v. *Frink*, 149 U. S. 629, 639–641, it was held that one essential to an estoppel by judgment is identity of cause of action, and that the cause of action in the judgment of the Supreme Court of Massachusetts, was not shown to be the same as that in the Federal court.

See further:

Aspden v. *Nixon*, 4 How. 467, *497*, *498*.

Stryker v. *Goodnow*, 123 U. S. 527, *538*.

Wilmington & Weldon R. R. Co. v. *Alsbrook*, 146 U. S. 279, 302.

Wash. Alex., etc., Steam Packet Co. v. *Sickles*, 24 How. 333.

Davis v. *Brown*, 94 U. S. 423, 428, 429.

Russell v. *Place*, *Idem*, 606.

Fairchild v. *Lynch*, 99 N. Y. 359.

Chrisman's Admx, v. *Harmon*, 29 Gratt. 494 (26 Am. Rep. 387).

Lewis v. *O. N. & P. Co.*, 125 N. Y. 341, *348*.
Bell v. *Merrifield*, 109 N. Y. 202, 211–214.
Jones v. *Kilbreth*, 49 O. St. 401.

Even when a counter-claim is set up in the former suit, but not actually adjudicated the defendant is not estopped from maintaining a separate action on it.

Man'f'g Co. v. *Colgate*, 12 O. St. 344.

But he is not required to plead his counter-claim as a defense to the former suit; he may withhold it and sue his claim in a separate action.

Witte v. *Lockwood*, 39 O. St. 141.

Fourth: **The decisions of the court below, as announced by Judge Severens, (90 Fed. Rep. 753, and 100 Fed. Rep. 178,) should have been adhered to by Judge Wing, and he should have refused to open up this controversy by permitting the supplemental plea to be filed.** This principle is well stated by Judge Coxe in *Wakelee* v. *Davis*, 44 Fed. Rep. 533, as follows:

"It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed upon similar facts until a different rule is laid down by the Supreme Court. A re-examination and discussion of the questions involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision."

This case was affirmed by this Supreme Court, 156 U. S. 680.

It has been repeatedly held by this court that in cases involving the construction of contracts, and even of state statutes, the Federal courts will construe them for itself, according to general principles of law, where a construc-

tion has not previously been put upon it by the Supreme Court of the state in which the cause of action arises.

Douglass v. *County of Pike*, 101 U. S. 677.

Rowan v. *Runnels*, 5 How. 134.

Ohio Life Ins. etc., Co. v. *Debolt*, 16 How. 416, *432*.

Loeb v. *Columbia Twp. Trustees*, 179 U. S. 472, *492*.

Capital City Light, etc., Co. v. *Tallahassee*, 186 U. S. 401.

On page 406 this court says:

"As the case involves the provision of the Federal Constitution, which prohibits the states from passing any law impairing the obligation of a contract, and as the State court has given effect to subsequent legislation, which, it is claimed, resulted in the impairment of the obligation of plaintiff's contract with the city, we are bound to determine for ourselves as to the existence and meaning of the alleged contract, in order to determine the question whether subsequent legislation has impaired the obligation thereof."

In *Burgess* v. *Seligman*, 107 U. S. 20, in the opinion of the court on page 32, Mr. Justice Bradley says:

"But the appellant's counsel, with much confidence, press upon our attention the decision of the Supreme Court of Missouri, on the questions involved in this case, and on the very transactions which we are considering. That court since the determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed." * * * (And on page 33.) "We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority."

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

And again: "But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

And see

Butz v. *City of Muscatine*, 8 Wall. 575, *582*.

L. & N. R. R. Co. v. *Palmes*, 109 U. S. 244, *255*, *257*.

Jefferson Bank v. *Skelly*, 1 Black. 436.

The above is as to the decisions of the highest courts of the State in conflict with decisions of the Federal courts, but the decision which the court below permitted to be pleaded in the supplemental plea in bar of the complainant's right to recover, was of the State Circuit Court of Defiance County, an intermediate court between the Court of Common Pleas and the Supreme Court, and that only on a question of law; in no sense was there any question of fact decided. The State Circuit Court held the contract of the Water Company illegal and granted a perpetual injunction against the payment by the city of any hydrant rentals, past or future, under it. It was this decision on *the law of the contract* merely that Judge Wing of the court below allowed to be set up in the supplemental plea *in bar* of our right of action. The decision of the State Circuit Court was no more binding on the Federal court than was the decision of the Court of Common Pleas, holding that the contract was valid for at least the term of twenty years, following the decision of Judge Severens in this case. 90 Fed. Rep. 753. We submit that this decision could not be pleaded in bar of our

action in the Federal court. The defendants could have availed themselves of whatever the decision was worth by citing it as an authority at final trial of the case.

Stryker v. *Goodnow*, 123 U. S. *538*.

Fifth: It was shown to the court below, both on the application for leave to file the supplemental plea and at the final hearing that the judgment there pleaded in bar of our suit had been taken to and was then pending in the Supreme Court of Ohio. The State case was taken into the Supreme Court of Ohio, May 25, 1901 (Rec. p. 204), leave was granted to file the supplemental plea June 17, 1901 (Rec. p. 96). We contend that while the judgment was pending on proceedings for reversal in the Supreme Court of Ohio, on a pure question of law (the construction of the contract), it could not be pleaded in bar of this suit, even if it were for the same cause of action.

2 Black on Judgments, Sec. 510.
Freeman on Judgments, Sec. 328.
Murray v. *Green*, 64 Cal. 303.
Purser v. *Cady*, 120 Cal. 214, *218*.
Sherman v. *Dilby*, 3 Nev. 21, *27*.
Glenn v. *Brush*, 3 Col. 26.
Ketchum v. *Thatcher*, 12 Mo. App. 185, *188*, *190*.
Dolk v. *Yelton*, 103 Tenn. 476.

Sixth: **The very purpose and object of bringing this suit was to get a construction of the Federal court of the contract, which, as we have stated above, will construe the contract for itself, and especially in this case where it appears in the bill that the suit in the State court was brought by collusion with the city solicitor and the council to enjoin themselves from paying the Water Company its hydrant rentals and that by means**

of it the decision of the Circuit Court of the State was secured in favor of the city, (statement of case, *supra*, pp. 1–11). It is a travesty on justice for the defendant to be allowed to plead a judgment obtained in such a way in bar of our right of action. In legal effect the judgment was procured by the fraud of the defendants and for that reason can not be pleaded as a defense to the bill.

Story Eq. Pl., Secs. 784, *794*, (9th edition).

Arrowsmith v. *Gleason*, 129 U. S. 86, *100*, *101*.

See also:

Calhoun v. *Millard*, 121 N. Y. 69, *76*,

approved by this court in

Andes v. *Ely*, 158 U. S. 312, *317*, *318*.

And see Pomeroy's Eq. Juris., Secs. 385, 397, *404*.

Seventh: **For the same reasons given above the court below should have held the supplemental plea insufficient in law. (Rec. p. 96, and 2nd assignment of error, p. 101.)**

II.

AT THE FINAL HEARING THE COURT BELOW ERRED:

First. The record offered in evidence in support of the supplemental plea should not have been received; it was not complete, hence did not support the plea. (5th assignment of error, Rec., pp. 101, 100, and 148–194.)

And the court should have received in evidence the complete transcript of the record of said case offered by the complainant. (6th assignment of error, Rec., pp. 101, 102, and 196–204.)

As the defendants were pleading the judgment in that case in bar of the complainant's right of action in this suit, the burden was on them to sustain, by *the complete record of*

the case, what the evidence given at the trial showed was actually litigated in that case, not only between the plaintiff and the defendants, but *between the defendants themselves*, the Water Company and the City Council, one of the defendants here.

Freeman on Judgments (4th Ed.), Sec. 276.
Davis v. *Brown*, 94 U. S. 423.
Russell v. *Place*, *Idem*, 606.
Chrisman's Adm'x v. *Harman*, 29 Gratt. 494, (26 Am. Rep., 387).
Bell v. *Merrifield*, 109 N. Y. *211*.
Lewis v. *O. N. & P. Co.*, 125 *Idem*, 341, *348*.

Second. The court below should have received in evidence the proofs offered by the complainant on the issue formed by said plea and the replication thereto, embraced in the sixth assignment of error, being the *complete transcript of the record of the* said case in the Circuit Court of Defiance County, the *sine die* adjournment of the term of said court, and the *deposition* of William A. Schmaltz. (Rec. pp. 99, 101, 102, 195–110.)

It appears conclusively from these rejected proofs that the judgment set up in defendants' supplemental plea is a nullity, having been made as well as entered long after the term had adjourned *sine die*. Mr. Schmaltz, the clerk of the court, testifies that he received the entry (of the judgment) by mail from the presiding judge on April 25th, with an order on it signed by the judges "to enter on the journal as of the date of March 15, 1901." And that he entered it on the journal under that date, on the "same day it was received" (April 25th). (Rec. pp. 206, 207.)

The March, 1901, term of the "court adjourned *sine die*" on March 15, 1901 (Rec. p. 195).

The case was heard and taken under advisement by the court March 12, 1901 (Rec. p. 200). The next entry on the journal is the judgment under date of *March 15th*, drawn by the judges and entered by the clerk *April 25th* (Rec. pp. 200–201). In this entry of theirs the judges recite that "to each and all of said findings and to said decision said defendant Water Company, by its counsel, then and there excepted." The next entry on the journal in the case is made in vacation, April 4, 1901, allowing a bill of exceptions to the defendant Water Company (Rec. pp. 201, 202). The most of this bill of exceptions is not printed here, but it appears (printed Rec. p. 203) that the bill of exceptions was allowed April 4, 1901, and the exception is to the "*finding* of the court in favor of the plaintiff."

It conclusively appears from the above that no judgment was rendered during the term; that the entry is not of a judgment *nunc pro tunc*, but that the judgment was rendered as well as ordered entered in vacation, *forty-one days after term*.

But even if the judgment had been announced during the term, it was not competent, under the practice in Ohio, to enter it after term.

Coe v. *Erb*, 59 O. St. 259, *275*, *276*.

In the opinion of the court, page 275, Chief Justice Spear says:

"As to jurisdiction, the Court of Common Pleas acquired jurisdiction of the parties and of the subject-matter. It pronounced a judgment during the term, but did not then enter it. One requisite of a judgment is that it must be given at the right time. As said by Bouvier, Law Dic., Vol. 2, page 15, 'To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it

when there was no court held.' Under our practice the court retains control of its journals during the term; it may then add to, strike out or alter that which is on the journals, or incorporate new matter On the final adjournment, however, that control is lost. This we take to be elementary. Confessedly the judge can not, in vacation after the term, render a judgment. How can he make an order affecting a judgment which he had in fact pronounced in term? an order necessary to complete the judgment and make it effective? While it can not be said that jurisdiction of the case had been lost, nevertheless an attempt to exercise jurisdiction at the time this entry is alleged to have been made, would, according to the authorities, have been as futile, at least as regards the rights of persons not parties nor privies, as though jurisdiction had in fact been lost because there was no court then to exercise it."

In *Muller* v. *Ehlers*, 91 U. S. 249, on page 250, in the opinion of the court, Mr. Chief Justice Waite said:

"Upon the adjournment for the term the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*."

Further, page 251:

"A judge can not act judicially upon the rights of parties, after the parties in due course of proceeding have, both in law and in fact, been dismissed from the court."

See also:

Bronson v. *Schulten*, 104 U. S. 410, *415*.

The conclusion follows from the above that the Circuit Court erred in its holding that "the said plea ought to be sustained." (Rec., p. 99.) This is covered by the seventh assignment of error, *supra*, *p.* 11. (Rec. p. 102.)

III.

AT THE FINAL HEARING THE COMPLAINANT'S COUNSEL REQUESTED THE COURT TO HEAR THE CAUSE UPON THE GENERAL ISSUES AS WELL AS UPON THE SUPPLEMENTAL PLEA, CLAIMING THAT THE PLEA DID NOT REACH TO ALL OF THE ISSUES, and offered to give in evidence its proofs on file in support of said issues.

"*But the court refused the said request and held that said plea extended to and was conclusive of all of said issues.*" (Rec., first two paragraphs, p. 98, and last paragraph of p. 99.)

These rulings of the court below are covered by the 3rd, 4th, 8th, 9th and 10th assignments of error, *supra*, pp. 10, 11. (Rec. pp. 101, 102.)

Equity rule 33 provides that:

"If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."

That is, *only* so far as they ought to avail him.

Pearce v. *Rice*, *142* U. S. 28, *42*.

In the opinion of the court in *Horn* v. *Detroit Dry Dock Co.*, 150 U. S. *625*, it is said:

"But even under this rule *when the plea meets and satisfies all the claims of the bill*, it ought, in law and equity, to avail the defendant so far as to require a final decree in his favor."

Under this construction of the rule, the strongest against the appellant that can be given, it is clear that the supplemental plea did not meet and satisfy all the claims of the bill? (See statement of case, *supra*, pp. 1–6.) Indeed, it fails to meet nearly all of the material issues of the bill.

First: **The principal theory of the bill is that the defendants, after the large expenditure of the complainant in the construction and maintenance of its water works, and after having enjoyed the benefits of the contract, and acted on it for ten years, and still retaining possession of and using the fire hydrants under the contract, are estopped from repudiating and attempting to abrogate it or denying its existence and validity, and the object and prayer of the bill is to enforce the contract against the defendant.**

A municipality, like a private person, may be estopped from asserting a stale claim against a party whom it has permitted to act on it to his injury, by which means it has received benefit during a long period of its acquiescence.

Elster v. *Springfield*, 49 O. St. 82, *98*.

City of Cincinnati v. *Evans*, 5 O. St. 594.

Moran v. *Com's of Miami County*, 2 Black, 722.

State ex rel. Garrett v. *Van Horn*, 7 O. St. 327, *331*, *332*.

In *County of Randolph* v. *Post*, 93 U. S. 502, in its opinion on page 513, the court says:

"We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract." Citing: Bigelow on Estoppel, 464; *Moran* v. *Commissioners*, 2 Black, 722; *Zabriskie* v. *Cleveland*, 23 How. 400; *Pendleton* v. *Avery*, 13 Wall. 297; 1 Dill. Mun. Corp., Sects. 375, 383, 385, 398.

See also:

Moore v. *Mayor*, 73 N. Y. 238.

This was a contract not *malum per se* nor against public policy, nor *ultra vires* in the sense that it was prohibited by

law; on the contrary municipal corporations were expressly authorized by statute to enter into such contracts and they were everywhere necessary for the public welfare; at worst it was a contract duly enacted by the city council but not ratified by the people's vote.

So that in this case the doctrine of *ultra vires* "will not be allowed to prevail to defeat the ends of justice or to work a legal wrong."

Railroad Company v. *McCarthy*, 96 U. S. 258, *267*.

On this question of estoppel and acquiescence see

Ely v. *Kellogg*, 15 O. St. 64.
State ex rel. v. *Mitchell*, 31 Id. 592.
Tone v. *City of Columbus*, 39 Id. 281.
Pomeroy's Eq. Juris., Secs. 816, 817.
Newberg Petroleum Co. v. *Weare*, 27 O. St. 343, 3d prop. of Syl.

In *County Com'rs* v. *Hunt*, 5 O. St. 488, 496 (for facts of case see page 489, *et seq.*), it was held that "there was a clear, moral obligation on the county to either give up the property or make compensation," and that "the court ought not to interfere by injunction to save the county from the payment of a demand having the sanction of moral obligation."

The case at bar comes directly within the decision of this Supreme Court in the case of

Hitchcock v. *Galveston*, 96 U. S. 341, which is conclusive of the whole matter in favor of the Water Company.

In that case the court in its opinion, by Mr. Justice Strong, says: (p. 350.)

"It matters not that the promise was to pay in a manner not authorized by law. If payment can not be made in bonds because their issue is *ultra vires*, it would be sanc-

tioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful."

And further on page 351:

"At most there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest only *ultra vires;* and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *The State Board of Agriculture* v. *The Gitizens Street Railway Co.*, 47 Ind. 407. There it was held that 'although there may be defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of a statute prohibiting it, and the corporation has by its promise induced a party relying on its promise and in execution of the contract to spend money and perform its part thereof, the corporation is liable on the contract.'" Citing cases in support of the proposition.

The principle is that execution contracts orginally *ultra vires* should stand good for the protection of rights acquired under a completed transaction.

Parish v. *Wheeler*, 22 N. Y. 494, 508–510.

In *Citizens' Water Co.* v. *Bridgeport, etc.*, 55 Conn. 1, it is held to be the duty of courts to presume contracts inviolate, and that *even if the common council had no power to make the grant named*, the defendant company having organized and acted on it, it became as effective as if the city had had the power to make it.

In *St. Louis, V. & T. H. R. R. Co.* v. *Terre Haute & Ind. R. R. Co.*, 145 U. S. 393, it was held that:

"A lease for 999 years by one railroad corporation of its railroad and franchise to another railroad corporation

which is *ultra vires* of one or both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract."

Mr. Justice Gray, in the opinion of the court (page 402), says:

"This was, in substance and in effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the state which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action nor suit by either against the other." Citing authorities.

And again (page 408):

"The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; *and the defendant has held the property and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.*

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches."

In the case of *Cook* v. *Com's of Hamilton County*, 6 McLean, 612 (in the U. S. C. C., Southern Dist. of Ohio), it appears from the opinion of the court, by Justice McLean, that the action was brought to enforce "a contract between the parties for the building of a court house and jail by the plaintiffs, for Hamilton county" (page 613,) not first submitted for approval to the voters of the county. It seems that an act of the legislature of Ohio, of 1848, was as follows (opinion of the court, page 619):

"That the commissioners shall not enter into any contract to build any poor house, or any other public building, which requires the expenditure of more than five thousand dollars, without first submitting as to the policy of such outlay, to the qualified voters of the county at the annual spring or fall election, by giving public notice, etc. And all contracts in violation of this section shall be void, as against the county."

In regard to this, on page 615, Justice McLean says:

"That contracts should be submitted to a popular vote, after they have been solemnly entered into, or notice given as the law required, is a new principle of constitutional law. It certainly affords no justification for breaking up the contract.

"When the sacredness of contracts, fairly entered into, shall be disregarded, under any pretense, there will be an end of all confidence and protection of persons and property. And where a contract is broken up without cause, it places the injured party on the same ground, in regard to an action for damages, as if he had performed the contract."

* * *

"The plaintiffs are entitled to compensation for the work done and the materials procured, at the time they were discharged from the contract."

In *Hutchinson & Southern R. R. Co.* v. *Board of Com's*, 48 Kan. 70 (30 Am. St. 273), it is held that the doctrine of estoppel applies to municipal corporations as to matters within the scope of their powers and the powers of their officers, so as to bind them by their acts of acquiescence, whenever an estoppel would exist in the case of a natural person. It is further held that a finding, on the part of the county commissioners, that the preliminary steps to validate the issue of bonds in aid of a railroad, one of which was the signing of a petition by two-fifths of the tax-payers of the township for an election to vote to issue bonds, estopped them from denying that the petition was so signed, where there had been laches on their part, in objecting to the issuing of the bonds. *In the opinion of the court, there is*

an exhaustive review of these questions of estoppel, laches and acquiescence, and we call the special attention of this court to it.

In *City Ry. Co.* v. *Citizens R. R. Co.*, 166 U. S. 557, the City of Indianapolis undertook to extend the charter of the Citizens Co. from thirty years to thirty-seven years, on the faith of which the company issued bonds and incurred certain other obligations; *held*, that the circumstances connected with the passage of the ordinance, extending the charter, operated to estop the city from denying that the charter was extended to thirty-seven years, and that the company had a valid contract with the city for the thirty-seven years.

That case is conclusive in favor of the Water Company of the validity of its contract with the city for the period of thirty years from August 17, 1887.

In *Doe d. Pennington* v. *Taniere*, 7 Eng. Rul. Cases 353 (12 Q. B.—Ad. & El. N. S.—998) the rule is established that "where a corporation have acted upon an executed contract, it is to be presumed against them, that everything necessary to make it a binding contract on both parties was done—the corporation having had all the advantage they would have had if the contract had been regularly made."

In *Seymour* v. *The Spring Forest Cemetery Ass'n*, 144 N. Y. 333, the court evidently had in mind such persons as the defendants in error in this case, saying in their opinion, page 341, "That kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state. * * * It must therefore pay, or its possession becomes robbery."

Wright v. *Hughes*, 119 Ind. 324 (12 Am. St. 412) holds that a corporation will not be heard to assert the invalidity of a transaction while retaining its fruits.

To the same effect are

Sherman Center Town Co. v. *Morris*, 43 Kan. 282, 19 Am. St. 134.

Whitney Arms Co. v. *Barlow*, 63 N. Y. 62, *68*, *69*.

Los Angeles v. *Los Angeles Water Co.*, 177 U. S. 558.

Houston & Tex. R. R. Co. v. *Texas*, *Idem*, 66.

Supervisors v. *Schenck*, 5 Wall. 772.

Zabriskie v. *C., C. & C. R. R. Co.*, 23 How. 381, and last par. of opinion, 400.

Brown v. *City of Atchison*, 39 Kan. 37 (7 Am. St. 515, *529*).

In *Hubbard* v. *Norton*, 28 O. St. 116, the court say (page 133):

"We think the action of the city authorities, in treating this contract as a continuing and binding obligation, in supervising and accepting the work, and in delivery of this assessment in payment thereof, after knowledge of this defense, was the exercise of a discretion vested in them, binding on the public, whose agents they were; and that by reason thereof, and because the plaintiffs in error failed to enjoin the prosecution of the work, they are now estopped from interposing this defense as a bar to a recovery for any amount."

State ex rel. v. *Trustees of Union Twp.*, 8 O. St. 394, 401, 402, 403.

The court says on page 402:

"Indeed the defense proposed to be set up, that in issuing these securities the township had not been careful in all respects to comply with the provisions of the statutes under which the proceedings were had, would seem to savor too much of taking advantage of one's own wrong to meet favor in a court of justice. It would certainly be counter to the spirit of the maxim, *nemo ex suo delicto meliorem suam conditionem facere potest.*"

State v. *Van Horn*, 7 O. S. 327, 332.

City of E. St. Louis Gas, etc., Co., 98 Ill. 415 (38 Am. Rep. 97, 101, 103.)

The court says on page 101 Am. Rep:

"There can be no doubt that it was within the scope of the authority of the city to contract upon the subject. There is nothing of illegality in the contract, such as requires that it should be held void in the whole—the part performed as well as that not performed; and what the city has received and enjoyed the benefit of, under the contract, there is no principle of law which will justify it in its refusal to pay for."

Trustees of Goshen Twp. v. *Shoemaker*, 12 O. St. 624.

In which the court say on page 627:

"An application for relief of this kind will also be affected by *laches* and acquiescence. Such acquiescence, while it may confer no right on the other party, will preclude the plaintiff from relief in a court of equity."

Shoemaker v. *Goshen Twp.*, 14 O. St. 569, 584, 588.

Anthony v. *same*, *Id.* 588.

And see the case of *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, 80, 81, where this court had in consideration a contract between the city and the same Samuel R. Bullock & Company who made the Defiance contract with which it is in many respects identical.

Further, under Sec. 5 of the contract (Rec. p. 14) it was the duty of the city council to submit the contract for ratification to a vote of the electors of the city, if necessary "*to vest in the Water Company the rights and privileges therein granted*," and the city was estopped to deny in its suit in the State Court that this was done. After this contract had been acted on for ten years the law presumes it was so ratified. A court of equity must hold that "what *ought* to be done was done."

Pomeroy's Eq. Juris., Secs. 364, 365.

We have argued this question of estoppel very fully, not only to show to the court that the supplemental plea does not

reach to this issue, but we shall claim hereafter that on the averments in the bill and admissions made in the answer the complainant is entitled to the decree as prayed for in the bill.

Second. **Section 1777, Revised Statutes of Ohio, did not authorize the suit in the State court, as against this appellant.**

So far as relates to this case said section is as follows:

"He (the city solicitor) shall apply in the name of the corporation to a court of competent jurisdiction for an order of injunction to restrain the misapplication of the funds of the corporation, or the abuse of its corporate powers, or the execution of or performance of a contract made in behalf of the corporation in contravention of the laws or ordinance governing the same."

The law applies only to contracts *not executed;* it can not be said to be a misappropriation of the city's funds to pay for water it had already received and used under the contract.

State v. *Coms.*, 56 O. St. 718, *720.*

See same case, 13 O. C. C. Rep. 15.

Nor do the averments in the plaintiff's petition, in the State court, give jurisdiction to that court to render the judgment which it rendered against the Water Company. The contract is not asked to be vacated nor is there any relief prayed for against the company. There is absolutely nothing in the petition to connect the Water Company with having anything whatever to do with the making of the contract. (See petition, Rec. pp. 148–150, and judgment of the State Circuit Court, p. 193.) The city solicitor could not treat this contract as void as to the Water Company, in this arbitrary manner.

Cin. & Springfield Ry. Co. v. *Carthage*, 36 O. St. 631–634,

and it was not competent for the court to enjoin the Water Company from enforcing the contract.

Walla Walla City v. *Water Co.*, 172 U. S. 1, *22*, *23*.
St. L. R. R. v. *T. H. R. R.*, 145 U. S. 393.

The city could not go into a court of equity to procure a judgment in this *indirect* way against the Water Company.

This was a question at issue before the Federal Circuit Court and one which it should have decided for itself.

IV.

ON THE BILL AND THE ADMISSIONS MADE IN THE ANSWER THE COMPLAINANT WAS ENTITLED TO A FINAL DECREE IN THE COURT BELOW FOR THE RELIEF PRAYED FOR.

We respectfully submit that such a decree should be ordered by this court. Under the averments in the bill and the admissions (see statement of the case, *supra*, pp. 1–11) the amount due the complainant, January 1, 1903, when the last installment for hydrant rentals fell due, is determined by a mere computation of interest; there was principal $33,811.50 and interest $4,958.33, total $38,769.83.

The sufficiency of facts such as those set out in our bill to warrant the relief prayed for has been decided lately by this court. In the case of *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, the same relief was asked in a bill which set out facts strangely similar to those in this case. A contract had been entered into by the City of Vicksburg and the same Samuel R. Bullock & Company who made the Defiance contract, which in many respects is identical with it. Both parties had performed the contract for many years. The city had passed resolutions denying its liability and refusing to pay at the contract price, and had voted to issue

bonds and build a plant of its own, and had brought suit in the State court to declare the contract void on the ground that it was *ultra vires* and exceeded the legal term. The Water Works Company then filed its bill in the United States Court to enjoin the threatened impairment of the contract. In the opinion by Mr. Justice Shiras (pp. 80, 81, 82) the court said:

"It can not be seriously contended that, under the act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of water works, and to contract with the party or parties to build and operate water works, and under the ordinance of the city of November 18, 1896, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.

"After the lapse of that long period and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, state and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States.

* * * * * * *

"Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November

7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question."

In the case at bar the proof of the impairment of the contract is entirely convincing.

On December 6, 1895, the city passed a resolution looking to the termination of the contract without complainant's consent and taking steps toward a bond issue of $75,000, and the building of a plant of its own. (Exhibit C, of defendant's answer, Rec. p. 73.)

On January 7, 1896, a resolution was passed reciting that no valid contract existed, that the service be discontinued and a different supply provided and declaring that no further payments be made for hydrant rentals at contract rates. (Exhibit D to defendant's answer, Rec. p. 74.)

At the spring election, April, 1896, the question of issuing the $75,000 of bonds for erecting a plant by the city, was submitted to the voters and carried by a large majority. (Rec. pp. 130, 131.)

On February 16, 1897, pursuant to a resolution of the city council, the water committee of the city council reported that the complainant had no "franchise" (meaning

contract) (Rec. pp. 145, 146, 147). And the council passed a resolution to provide a new contract against the will of the complainant, and directing the city solicitor to bring suit to enjoin the company from protecting its rights by shutting off the water (Rec. p. 147).

On March 12, 1897, a resolution was passed by the city council providing for an investigation by the water committee of the probable cost of water works for the city and the approximate income number of consumers in the city, etc. (Rec. p. 131.)

And finally on June 4, 1898, the city solicitor, by the collusion and procurement of the council, brought suit in the Court of Common Pleas of Defiance County to enjoin the city council from paying the Water Company anything for water received and used before that time or to be used afterward.

We have brought our proofs, on the general issues, filed in the court below, into this court, not that this court will look outside of the bill, answer and replication to determine these issues, but that, if disputed, this court can see for itself on inspection, that our proofs fully sustain all the charges of the bill.

Respectfully submitted,

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Solicitors for Appellant.

ROBERT W. BINGHAM, *of Counsel.*

SUPREME COURT OF THE UNITED STATES

THE DEFIANCE WATER COMPANY,
Appellant,
vs.
THE CITY OF DEFIANCE, ET AL.,
Appellees.

October Term, 1902
No. 257.

Supplemental Brief for Appellant.

Counsel for the appellees argue that the plea of *res judicata* was properly received in the Court below and that it extended to all the issues in this case. On the other hand we contend:

1. The plea of *res judicata* was not sufficient in law and should not have been received.—

(a) Because the decision plead was on a question already adversely decided by the U S. Court for itself, before the State Court acquired jurisdiction.

The bill was filed in the Court below on June 24, 1898 (Rec. p. 1). Demurrers were filed by the defendants July 8, 1898, and renewed October 19, 1898, and on December 30th they were heard by the Court and overruled, his Honor Judge Severens sitting (Rec. p. 31), and the Court held that the contract was valid and that the bill presented a good cause of action. That decision was reaffirmed by Judge Severens upon re-argument at the request of the defendants, and later in effect, by Judge Wanty, and stood unqualified during preparation of the case for trial and down to final decree December 21, 1901. Meanwhile in the state case final judgment was given on demurrer January 16, 1899, in favor of the Water Company, the Court holding the contract valid for at least twenty years. Trial on appeal in the State Circuit Court was not had until March, 1901, when that Court decided against the Water Company. It was this decision which Judge Wing allowed to be plead in bar of this action in the Court below. It ought not to have been given any consideration in the Federal Court, because in reaching it the State Court had ignored the prior decision of the Federal Court on the same question, and because that prior decision had become the law of the case in the United States Court between the parties and controlling therein until properly reviewed.

The principle of this—That a decision on a demurrer is the law of the case to be followed in the same Court on similar facts until set aside or reversed in a proper proceeding—has become well settled. It becomes a matter of record not to be disputed, except on different facts; especially not to be disputed by the record of another court. In the United States

Court its own record must prevail over any other. The following authorities we think, fully sustain this position:

His Honor, Mr. Justice McKenna, then Circuit Judge, in the case of Bowdoin College vs. Merritt, 63 Fed, Rep. 213, 215, held that the decision of another judge on a demurrer in the case, became the law of the case and must be observed.

Mr. Justice Field said in the case of Cole Silver Mining Co. vs. Water Co., 1 Sawyer 685, case No. 2990, 6 Fed. Cas. 72:

"The circuit judge possesses equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law should be disregarded, or be open to review by the other judge in the same case."

This was followed and quoted by Judge Pardee in Preston vs. Walsh, 10 Fed. Rep. 315, saying:

"Justice Field on the ninth circuit, in the case of Cole Silver Mining Co. vs. Virginia & Gold Hill Water Co., 1 Sawy. 685, refused to hear questions of law previously determined by the circuit judge in the same case, ...

"The proposition, so evident upon its face, acquires greater force when the circuit judge is called upon to consider the rulings of the circuit justice in the same case. See 2 Fish. Pat. Cas. 120. This case has been before this court for hearing upon demurrer and for injunction pendente lite, and was heard and decided by my predecessor, Judge Woods, now circuit justice of this circuit. . . . . .

"So far then as any of these questions now come up for consideration in determining the rights of the parties now before the court, they must be taken as settled for this case in this court, if for no other case nor any other court. And for further authority see Aurora City vs. West, 7 Wall. 99."

In this last case also the bill had been amended since the

decision of the demurrer, making it direct authority against the appellees who contend that after the filing of the answer upon leave, the question of law was an open one again.

The Supreme Court of Wisconsin has decided this question in appellant's favor in a very similar case *Ellis vs. No. Pac. R. R. Co.*, 80 *Wis.* 459 (*27 Am. St.* 44), in which it was sought to plead as *res judicata*, the judgment of a Federal Court, after the State Court and the State Supreme Court had adversely decided the same question on demurrer. It was held that the question was already *res judicata* in the State Court by the decision on demurrer.

The Court said in Cocke vs. Halsey, 16 Pet. 71, 87:

"The correct legal principle applicable to such proceedings is this, That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this Court, as in the cases of Thompson vs. Tolmie and others, 2 Pet. 157; The United States Bank vs. Arrendondo, 6 Pet. 720; Voorhees vs. The Bank of the United States, 10 Pet. 473, and The Philadelphia and Trenton Railroad Company v. Stimpson, 14 Pet. 458."

See also

Wakelee vs. Davis, 44 Fed. Rep. 532.

Thompson Trials, Sec. 1061.

Oglesby vs. Attrill, 14 Fed. Rep. 214.

Beach Mod. Eq. Ptce. Secs. 275, 636.

Pennsylvania Co. vs. Platt, 47 O. St. 366.

A hearing on demurrer is a trial on issues of law and the decision is final unless further proceedings are allowed.

Alley vs. Nott, 111 U. S. 472, 475, 476.
Bissell vs. Spring Valley Twp., 124 U. S. 225.
Cutler vs. Wright, 22 N. Y. 472, 475, 478, 479.
Story Eq. Ptce., Sec. 460.
Beaumont et al. vs. Herrick, 24 O. St. 445, 457.
Price vs. Coleman, 22 Fed. Rep. 694.

And it is firmly settled that as long as the facts remain substantially the same, judgment on demurrer is *res judicata*.

Gould vs. Evansville, Etc., R. R. 91 U. S. 526, 533.
Connecticut Mutual Life Insurance Co. vs. Smith, 117 Mo. 261, 296, 297 (38 Am. St. 656).

In view of these authorities the decision on demurrer seems final between the parties, unless properly reviewed (which it was not) or unless new facts were produced other than those on which it was decided. It may be asked whether there were any new facts to give a different basis for the State decision and conclude the parties. There were not. The decision of the State Court was on the same grounds several times urged to the Federal Court as reasons why its decision on the demurrer should be for the defendants, and as often overruled by the Federal Court. It was in fact a mere opinion as to the effect of the statutes already construed by Judge Severens.

(b) The plea should not have been received in this case, because it set up a judgment obtained in a case alleged in the bill herein to be collusive and part of the very act from which complainant sought relief (Rec. pp. 2, 8).

Complainant offered to sustain these charges by its proofs showing the collusion, showing even that the defendant council admittedly made no defense, but was represented in court by Mr. Harris who conducted the case for the plaintiff, and moved for judgment against his own client (Rec. p. 203). It was at least the duty of the Court below to consider the evidence on this issue. See in addition to citations on page 21 of our original brief, Corbus vs. Gold Mining Co., 187 U. S. 455, last par. pp. *457*, *458*, and opinion of Court p. 465, in which Mr. Justice Brewer says:

"The district judge in his opinion, said that the facts disclosed by the record lend color to the contention that the suit was collusive. In addition to the matters pointed out by him it may also be stated that since the case was brought to this court the company has not appeared by counsel in either brief or argument."

(c) Neither the cause of action nor the parties were the same in such sense as to make the record in the State Court an estoppel in the other courts.

The action in the State Court was a taxpayers' action under Sec. 1777 of the Revised Statutes of Ohio. The parties in interest were the taxpayers in whose behalf such actions proceed. The relief asked was not the cancellation of the contract alleged to be illegal, nor that it be declared void; but that

the council should be enjoined from making what was alleged to be an illegal appropriation of money. The real plaintiffs were the taxpayers. The real object was the restraining of an illegal act by the council.

The Water Company, though nominally a party defendant, was not a necessary one.

City Water Supply Co. vs. City of Ottumwa, 120 Fed. Rep. 309.

The Water Company should not be held barred of its remedy by its necessary defense of such a case.

On the other hand, the case in the United States Court below was brought by the Water Company to determine its rights against the city. It had a right to its own action which it might control as it pleased, and to have its rights determined in such proper court as it chose.

Witte vs. Lockwood, 39 O. St. 141.
Brown vs. Gallaudet, 80 N. Y. 413.
De Graaf vs. Wyckoff, 118 N. Y. 1.
Washburn vs. Scutt & Co., 22 Fed. Rep. 710.

And in this United States case the city itself was the defendant, not the taxpayers who were not even proper parties and were not directly interested, and the city solicitor who represented them in the State Court had nothing to do with the suit; so that the parties were substantially different and the cause of action entirely so, but to bind the parties in a suit not on the same cause of action, they must be identical. We submit that this is especially true where the matter decided is a

pure question of law. Hence the State decision was not a bar in this case.

II. The plea did not extend to all the issues in the case.

It only exhibited a decision and finding of the State Court that the contract was illegal, but there were other things which the complainant had a right to have determined in its own action in the United States Court.

1st. Whether the city itself (not the taxpayers and solicitor, which question was perhaps at issue in the State Court) and the council were not estopped by ten years' performance and enjoyment of the contract from the defense that it was invalid for want of a vote at its inception. Much of the evidence which would prove that the city and council were estopped from testing the validity of the contract would not apply to the city solicitor and the taxpayers, whom he represented in the State suit, yet would entitle the complainant to a decree in the United States Court, and it was incumbent on that Court to try the case as therein made between the parties.

2d. There was the purely federal question whether the acts of the city by refusing to carry out the contract, by voting to build its own plant, by retaining the possession of the hydrants and bringing a collusive suit to enjoin itself from paying any rentals, and by the numerous other acts shown in the proofs, were not violating the complainant's rights under the constitution. The United States Court had paramount jurisdiction of this question obtained long before the State Court came to consider the case; and the city solicitor and taxpayers

were not proper parties to such a controversy. Under the Vicksburg case (185 U. S. 65) the decision of this question on demurrer in favor of the complainant was correct, and therefore it was the duty of the Court to proceed to hear the evidence and determine whether the allegations of the bill were true, and unless the evidence showed a new state of facts to which the decision on the demurrer was not applicable, to grant the complainant final decree.

3d. There was no claim set up in the State Court, or there adjudicated, of the Water Company's right to recover for water furnished and admittedly received by the city. Unquestionably this was a distinct issue not involved in the State case. There might be many reasons why an accounting and judgment must be granted against the city for the water furnished, independently of the validity of the contract between the parties, and the Court erred in disposing of the case on the decision of the State Court which only decided that question and questions which arose between the Water Company and the city solicitor and taxpayers.

Counsel for the appellees argue that the decision of the Court below on the demurrer, holding the contract valid is not correct. While we think that question is not before this Court for decision, we refer the Court to Judge Severens' opinion (Rec. p. 31 and 90 Fed. Rep. 753). The law under which it was made is as follows (83 O. L. 146):

"Section 1. Be it enacted by the General Assembly of the State of Ohio, that all cities of the fourth grade of the second class in which water works are now erected, constructed and existing, or in which they may hereafter be erected, wheth-

er such water works are owned by an incorporated company or by an individual or individuals, shall have power to contract with such company, owner or owners of such water works for supply of water for fire purposes, streets, squares and other public places within the corporate limits, and for supplying the citizens of such municipal corporation with water, or any or either of them for any term not exceeding twenty years."

Passed May 12, 1886.

The city thus having power to contract for any term not exceeding twenty years, the whole question becomes: Can the Court—in accordance with the well settled rule which gives effect to contracts and upholds vested rights whenever possible—disregard the portion of the contract in excess of the twenty year period and hold it valid for that period without doing violence to the expressed intent of the parties? Clearly it can. The contract was separable and expressly provided that in event of its termination, which might occur by purchase at the end of any five year period except the first, the unexpired portion of the term should not be considered in fixing the value (Sec. 9, Rec. p. 15). It was thus the express intent of the parties that the length of term was not part of the consideration, and to carry out the contract for twenty years and then under certain conditions to terminate it. If the parties themselves contemplated its termination at that time by the operation of its own provisions, how can it be said that its limitation to the same time by operation of law, had the effect of making it void from the beginning, even after ten years of unquestioned performance?

The whole case may be comprehended in a single ques-

tion: Must the action of the Federal Court after it had formally decided the questions involved in this case be controlled by a subsequent decision, disregarding its own, by a State intermediate court, in a case exhibited in the bill in the Federal Court and there alleged to be collusive and for the purpose of depriving the complainant of its rights under the Federal constitution, and where the parties in the two cases appear in different capacities with different rights and in a different cause of action? We think the answer to this question must be in our favor and final in this case.

Respectfully submitted,

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Solicitors for Appellant.

Office Supreme Court U. S.
FILED
OCT 13 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 21 of October Term, 1903.
(257 of October Term, 1902).

THE DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE ET AL.,
Appellees.

CITATION OF

Defiance Water Co. vs. City of Defiance, 68 O. St., 520, and Butler vs. Eaton, 141 U. S. 240, Supplemental to Appellant's Briefs at Hearing.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
SOLICITORS FOR APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 21.

THE DEFIANCE WATER COMPANY

vs.

THE CITY OF DEFIANCE ET AL.

Since this cause was argued and submitted to the court, April 22d last, and since the adjournment of this court, the Supreme Court of Ohio on the 16th day of June, reversed the judgment of the Circuit Court of Defiance County, Ohio, which the defendants herein, by supplemental plea, pleaded in the court below as an adjudication *in bar* of this complainant's suit; and dismissed the suit of the city, thereby annulling the judgment of the state court. The Supreme Court of Ohio in its decision, holds directly that the right of action of the city of Defiance in the state court, was barred by the Ohio statute of limitations, at the time the suit was commenced, and, in substance, that the city was estopped from bringing the suit. We annex hereto the opinion of the Supreme Court of Ohio, printed from the proof sheets of the official report (68 O. St. 520, 48 Ohio Law Bulletin, 687), and by leave of this court cite it herein.

The decision of the state, inferior court pleaded in bar to this suit, having been annuled by the State Supreme Court, on that ground alone, if no other existed, this court, following

Butler v. *Eaton*, 141 U. S. 240, *243*,

should reverse the judgment of the court below.

And, as at final hearing of this suit, in the court below, the defendants relied solely on their supplemental plea, and persistently objected to the complainant's offering proof on any of the other issues, in which they were sustained by the court, having chosen to rely on their plea, rather than on the merits of their case, final decree ought now to be ordered for the complainant. Also, as we contend in our original brief, page 35, the complainant is entitled to a final decree on the bill and answer.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Solicitors for Appellant.

DEFIANCE WATER CO. *v.* DEFIANCE (CITY).

ACTION TO ENJOIN PAYMENT UNDER CONTRACT, BARRED IN TEN YEARS.

An action under Sec. 1777 Rev. Stat., to enjoin the payment of a demand arising under a contract, in which the ground for the relief sought is the invalidity *ab initio* of the contract, is barred under Sec. 4985 Rev. Stat., in ten years from the time the contract was entered into.

(June 16, 1903.)

Error to the Circuit Court of Defiance County.

This suit was brought on January 4, 1898, by the city solicitor of the city of Defiance in the name of the city under Sec. 1777 Rev. Stat., against the council of the city. The plaintiff seeks to enjoin the council from paying the plaintiff in error, The Defiance Water Co., the sum of $3,142.50, which it alleges is claimed by the water company from the city "for water furnished said city during the latter half of the year 1897." It is alleged that the water company claimed that said sum was due to it in accordance with the provisions of a contract entered into on August 17, 1887, between the city and S. R. Bullock & Co. to whose rights the plaintiff in error succeeded. It is alleged that the contract is illegal on the following grounds: First, that it is for the term of thirty years and not ratified by a vote of the electors of the city. Second, that no certificate had been made by the city clerk that the money required to meet the obligations arising under the contract was in the city treasury to the credit of the fund from which it was to be drawn. Without notice a temporary injunction was allowed upon this petition by the probate judge. Afterwards in the court of common pleas a general demurrer to the petition was sustained and final judgment rendered in favor of the plaintiff in error dissolving the temporary injunction and dismissing the plaintiff's petition. On appeal to the circuit court the demurrer to the petition was overruled, and after answer by the plaintiff in error and reply by the defendant in error, the suit came on for final hearing, in which the circuit court found in favor of the city and against the water

company. This proceeding in error is brought to reverse the judgment of the circuit court.

HENRY NEWBEGIN and ROBERT NEWBEGIN, for plaintiff in error.

GEORGE T. FARRELL, city solicitor, and HENRY B. HARRIS, for the defendant in error.

DAVIS, J.—There are several very interesting legal propositions propounded and defended in this case; but we think that one point in the case is decisive, rendering it unnecessary to consider any of the others If it be true that the contract between the defendant in error and Samuel R. Bullock & Co., to whose rights thereunder the plaintiff in error succeeded, was invalid for any of the reasons assigned, it is clear that a cause of action to restrain its performance accrued as soon as the parties attempted to enter into it and to act upon it, that is, upon August 17, 1887. An action for relief of the kind sought in this action is barred in ten years, Sec. 4985 Rev. Stat. This suit was begun January 4, 1898, ten years, four months and seventeen days after the cause of action accrued. Meantime the water company constructed the waterworks at great expense; and as it appears from the pleadings, the defendant in error accepted the waterworks under the alleged contract, took possession of and used hydrants as provided, and paid the water rent therefor for several years, without any question being raised as to the legality of the contract or the liability of the city. In fact, although there has been some contention over the validity of the contract since 1896, the defendant in error has used the hydrants and paid the water rents until about the time the present suit was begun. It is a stale equity, if any, which it is now sought to assert. Kellogg v. Ely, 15 Ohio St. 64. It is true that the object of this action is to restrain the payment of a demand under the contract which only accrued in 1897, and to restrain the payment of any other or further claims; but the ground for the relief sought, and the sole pretext for refusing to pay for that which the plaintiff below has had and enjoyed is the alleged invalidity of the contract which it entered into on August 17, 1887, a ground which it might have asserted and which it was its duty to assert, if at all, long before it did so in this action. There are averments in the reply of unfitness of the water supplied and of the mains, pipes and hydrants being stopped with mud; but

these can not be considered as a ground for injunction in this case because the plaintiff can only recover on the cause of action stated in the petition. *Durbin* v. *Fisk*, 16 Ohio St. 533.

The judgment of the circuit court is reversed, the demurrer to the petition is sustained and the petition is dismissed.

BURKET, C. J., SPEAR, SHAUCK and CREW, JJ., concur.
PRICE, J., not participating.

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OFFICE RECEIVED JAN 28 1904 SUPREME COURT

Supreme Court of the United States.

NO. 21, OCTOBER TERM, 1903.

DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE ET AL.,
Appellees.

PETITION FOR REHEARING AND MODIFYING JUDGMENT AS TO COSTS OF APPEAL.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
COUNSEL FOR APPELLANT.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 21.

DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE ET AL.,
Appellees.

Petition for Rehearing and Modifying Judgment as to Costs of Appeal.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The said appellant in this cause, decided November 30, 1903 (191 U. S. 184), respectfully asks for a rehearing thereof; it suggests especially that the judgment of this court should be modified as to the costs of the appeal.

The court holds that the appeal was properly taken from the Circuit Court to this court and it reverses the judgment below, *at the cost of the appellant*, and remands the cause to the Circuit Court with order to dismiss the bill of complaint, for the reason that it is not clearly and fully set forth in the bill that the rights of the complainant, guaranteed by the Constitution of the United States, have been violated by the defendants.

We concede that the facts which give the court below jurisdiction must be set forth in the bill, and that this jurisdiction can not be aided or defeated by the subsequent proceedings in the suit.

We respectfully suggest that between courts of concurrent jurisdiction, we not only had the right, but it was our duty to litigate the complainant's claim in that forum wherein his rights would be best subserved.

In addition to the cases cited in appellant's supplemental brief, page 7, *see*

Pierce v. *Feagans*, 39 Fed. Rep. *588*.
Stanton v. *Embrey*, 93 U. S. *554*.

The complainant's counsel brought this suit in good faith in the court below, as one in which there was a controversy "arising under the Constitution of the United States," and fully believing that the Federal court had concurrent jurisdiction with the state court of the suit. In this opinion they were sustained by the Circuit Court (Judge Severens, 90 Fed. Rep. 753,) and it would seem that the Vicksburg case, (185 U. S. 65,) a suit based on a contract and facts similar to, if not identical with those in this suit, especially

as regards the question of jurisdiction, was conclusive of the jurisdiction of the court below on the facts, if properly pleaded in the bill. *See* also, *Los Angeles* v. *Los Angeles Water Co.*, 177 U. S. 558.

The jurisdiction of the court below was not based solely on the resolution or ordinance of the City Council of January 7, 1896, but on many other acts of the City Council, fully noted, with references to the record, on pages 37 and 38 of appellant's main brief; especially was the action of the City Council in the resolution of February 18, 1897 (Rec. p. 147), instructing the city solicitor to sue to enjoin the shutting off of water from the city and public, while they were still using it without paying therefor, an infringement of the complainant's constitutional rights.

We respectfully suggest, in view of the opinion of this court, that we should be permitted to amend our bill in the court below, upon such terms as may be just, as the amendment would contain nothing not now appearing in the record.

We respectfully submit that the costs of appeal to this court should be wholly taxed against the appellees or, if the court so find, should be apportioned between the parties in such manner as may be just. It is not the ordinary case of failure to properly plead the diverse citizenship of the parties, by reason of which the court below did not acquire jurisdiction. The judgment of the court below, which this court now reverses, was on a supplemental issue raised by the defendants, entirely foreign to the bill. In view of what we have said *supra*, in support of our petition for rehearing,

it would seem but just and right that the costs of this reversal should be adjudged against the defendants if the petition is denied.

Mansfield, Coldwater, etc., Ry. Co. v. *Swan*, 111 U. S. 379.

Hancock v. *Holbrook*, 112 U. S. 232.

Peper v. *Fordyce*, 119 U. S. 469.

Respectfully submitted,

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Counsel for Appellant.

We hereby certify that in our opinion the foregoing petition is well founded.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Counsel.

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JAMES H. McKE

Supreme Court of the United States

OCTOBER TERM, 1902

No. 257 21

THE DEFIANCE WATER COMPANY, Appellant,

vs.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE, Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

DEFENDANTS' BRIEF

FRED L. HAY, City Solicitor.
HENRY B. HARRIS and JOHN P. CAMERON, Solicitors for the Council of the City of Defiance.

Supreme Court of the United States.

THE DEFIANCE WATER COMPANY,
Appellant,

v.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE,
Appellees.

STATEMENT.

On the 4th of January, 1898, the City of Defiance, Ohio, by its solicitor, brought suit against the council of the city of Defiance, Ohio, and the Defiance Water Company, to have enjoined and prohibited all future payments under a certain alleged contract, attempted to be made on August 17, 1887, by and between the council of said city of Defiance and Samuel R. Bullock & Company (and by said Bullock & Company assigned to said The Defiance Water Company, as provided for in said contract), for the furnishing of water to said city of Defiance by said water company for the term of thirty (30) years from said August 17, 1887, for the reasons that said contract was made without vote authorizing it and without certificate made and filed as required by Section 2702, Revised Statutes of Ohio, and was made for the term of thirty years; and it was averred in said petition that, for each and all said reasons, said con-

Petition in state court.

tract and all action thereunder was void and prohibited by the Ohio statutes. (Rec., p. 148, *et seq.*)

A preliminary injunction was granted in said cause as prayed for. (Rec. 151.)

Proceedings and decree.

This cause was removed by the Defiance Water Company to the circuit court of the United States for the northern district of Ohio, western division. (Rec., p. 153.) A cross-bill was filed by said water company against said city and the council of said city. (Rec., p. 156.) On motion of the city and the city council, said cause was remanded to the common pleas court of Defiance county, Ohio, and the water company had leave to withdraw its cross-bill. (Rec., p. 156.) Upon the cause being remanded, a demurrer was filed by the water company to the petition and sustained, and the city not desiring to amend, the petition was dismissed and the cause appealed to the circuit court of Defiance county, Ohio. (Rec., pp. 157, 159.) In Ohio, on appeal, causes are tried *de novo* in the appellate court. In the circuit court the demurrer was overruled (Rec., p. 164); the water company answered (Rec., pp. 166 to 174), and the city replied to this answer (Rec., p. 175). The cause was submitted on the issues so joined and a finding and final decree rendered in favor of the city and against the water company and the city council. (Rec., p. 192.)

Bill in federal court.

Upon the federal court remanding the said cause, the water company withdrew its cross-bill theretofore filed in said court (Rec., p. 156), changed the title of said cross-bill and filed it as a bill in equity in said court against the city of Defiance and the council of the city of Defiance. (Rec., p. 1.) Said complainant, by said bill and amendments which it made thereto, sought to recover hydrant rentals from said city under said contract (Rec., p. 174), asked that said contract of August 17, 1887, be declared valid, said city and its council enjoined from disputing its validity or refusing to pay the amounts there-

tofore or thereafter payable thereon according to its terms. (Rec., pp. 1 to 27.) To this bill the city and city council filed demurrer (Rec., p. 29), and plea (Rec., p. 36) supported by answer (Rec., p. 52), which were overruled, and thereupon they filed answer (Rec., p, 56), which, on the water company's motion, was adjudged sufficient. (Rec., p. 79.) The water company filed replication. (Rec., p. 80.) Evidence was taken and filed by the respective parties.

Proceedings and issues.

Before the cause was reached for hearing, the final decree of March 15th was entered in the circuit court of Defiance county, as above stated, and on May 2nd the city and the city council applied for leave to plead the judgment of the state circuit court as *res adjudicata* of the water company's suit in the federal circuit court. (Rec., p. 87.) On May 28th this was allowed on designation of said pleading being changed from supplemental answer to plea. (Rec., p. 89.) This plea was set down for hearing, heard and adjudged sufficient. (Rec., p. 96.) The water company replied to it on August 5, 1901, and evidence was taken and filed on the issues joined touching said plea. (Rec., p. 97.) On the 21st of December, 1901, the cause was heard on said plea and the evidence thereon, whereupon said plea was sustained and the complainant's bill was dismissed, at its costs, and costs adjudged to the defendants. (Rec., p. 98.)

Plea of res adjudicata.

Decree.

The proceedings of parties and the circuit court on said hearing are recited and set forth in the text of the final decree of December 21, 1901. (Rec., pp. 98 to 100.)

The water company appealed from said decree to this court and filed ten (10) assignments of error (Rec., pp. 101, 102) as the basis of its request for a reversal of the judgment and decree of the said circuit court.

Appeal.

The substance of these assignments of error is that the court erred :

(1) In permitting the plea, and the transcript from the state court to be filed.

(2) In holding the plea sufficient.

(3) In refusing to hear the case on all the issues joined and on all the evidence taken in the case by the water company.

Assignments of error.

(4) Same as number 3.

(5) In admitting evidence offered by defendants.

(6) In rejecting evidence offered by the plaintiff on the hearing.

(7) In adjudging the plea should be sustained.

(8) In refusing to hear the case on the original pleadings and evidence in support thereof.

(9 & 10) In holding the plea extended to the whole issues and was conclusive thereof, and in making final decree in favor of defendants.

ARGUMENT.

—1—

Did the court err in permitting the plea and transcript to be filed?

Errors not separately assigned.

The first assignment of error asserts that the court erred in permitting the defendants to file the plea and the transcript of the record from the state court. (Rec., p. 100.)

This assignment does not comply with Rule 35, which prescribes that assignments of error "shall set out separately and particularly each error asserted and intended to be urged * * * errors not assigned according to this rule will be disregarded. * * *"

Equity Rule, 35.
Rule Supreme Court, 21.
Section 997, Revised Statutes.
Clark v. Deere & Mansur Co., 25 C. C. A. 619, *621.*

U. S. v. I. G. D. Dist., 29 C. C. A. 578.
Rowe v. Phelps, 152 U. S. 88.

Without waiving our claim that this first assignment should be disregarded, we submit the action of the circuit court, challenged by this assignment, was right.

As to leave to file the plea.

When the application for leave to file the plea (supplemental answer, as it was then denominated) was presented to the court, its discretion was appealed to, and we apprehend that in order to reach a proper decision it had to consider and determine only two questions, viz: Did the plea tendered by the defendants, on its face, present a *prima facie* defense to the suit of the water company, or to some material issue or fact therein controverted? Were the defendants reasonably diligent in asking leave to file such plea? Leave to file plea.

The defense set up by the pleading is a *former adjudication.* The essential elements to make a good plea of former adjudication, are: (1) That the adjudication was made by a court of competent jurisdiction on the merits. (2) That the suit in which the adjudication was made was between the same parties as the suit in which the adjudication is plead, or their privies, and in the same relation; and (3) That the two suits involve the same issues and the adjudication was based thereon; or that some right, question, or fact on which the plaintiff's right of recovery in the pending cause depends, was distinctly put in issue and adjudicated in the former case, although the former suit was for a different cause of action; or, where the suits are between the same parties, that the pending suit involves the same title and depends upon the same questions, even though based on a different subject matter. Rule laid down in: Requisites of plea.

Bigelow v. Winsor, 1 Gray, 299.
1 Greenleaf Ev., Sec. 532, note.

Linton v. Nat. Life Ins. Co., 104 Fed. Rep. 584 (C. C. A.)

City of Aurora v. West, 7 Wall. 82, *90*; B. 19, p. 42.

New Orleans v. Cit. Bank. 167 U. S. 371, B. 42, p. 355.

So. Pac. Ry. Co. v. U. S., 168 U. S. 1; B. 42, p. 202.

Freeman on Judgments, Vol. 1, Secs. 252, 255, 259.

Norton v. House of Mercy, 41 C. C. A. 399.

Meis v. Gill, 44 O. S. 253.

Gas Light Co. v. Zanesville, 47 O. S. 35.

Tiago Ry. Co. v. B. & C. Ry. Co., 20 Wall. 137.

Cromwell v. Sac. Co., 94 U. S. 351.

Madison v. Garfield Coal Co. (Ia.), 86 N. W. Rep. 41, 47, and cases.

Stewart v. Village of Ashtabula, 107 Fed. Rep. 857.

Mitchell v. First Nat. Bank, 180 U. S. 471.

Allis v. Davidson, 23 Minn. 442.

Duden v. Maloy, 43 Fed. Rep. 407.

Gordon v. Johnson, 3 Col. App. 139; 32 Pac. Rep. 347.

Smith v. Kernochen, 7 How. 198, 217.

Thompkins v. Hyatt, 28 N. Y. 347, and cases hereafter cited.

In the case at bar in June, 1898, the water company sued the city and the council of the city on the alleged contract of August 17, 1887, which it seeks to have declared valid. It prays for a decree that the city and the city council be enjoined from disputing the validity of the contract, or the amount payable thereunder, and that the contract be adjudged a valid and existing obligation of the city and that the council be ordered to make payment thereunder. (Rec., p. 1.) The right to this relief is based on two contentions: (1) *That the original contract was*

Plea sufficient.

and is valid, and (2) *that whether valid or not the city and its council were estopped from asserting its invalidity.* These claims are denied by the city and the city council, and the alleged contract is averred to be illegal, void, and prohibited by statute. (Rec., p. 56.) Under these circumstances the right to the relief, or any of it, prayed for by the complainant, depends upon the basic fact, *a contract between the city and the water company*, made to appear from a valid contract, or from an informal or irregular contract aided by certain estoppels.

The suit in the state court was commenced first on January 4, 1898, by the city against the council and the water company to enjoin and prohibit the payment of any amount claimed then to be due or thereafter to become due the water company under the contract, averring the same facts that are alleged in the answer in the federal court. (Rec., p. 148.) To this petition the water company set up a denial of the facts alleged as constituting the invalidity of the contract and a claim of its validity, and set forth each and all of the facts which it claimed constituted an estoppel against the city and the city council in substantially the same words as in its bill and amendments and supplements herein. To this the city replied. (Rec., p. 166.)

Same.

On these issues the state court, after hearing all the evidence offered by both parties, pursuant to a motion made by plaintiff at the close of the evidence in support of the water company's answer, adjudged the contract illegal and void, enjoined its performance or the payment of anything to the water company thereunder, and enjoined the council from taking any measures looking to the carrying out of said contract. (Rec., p. 192.)

Judgment in state court.

It is claimed by the defendants that this constituted a complete adjudication to complainant's present suit, because it appears the judgment sought to be pleaded was rendered by a court of competent

Judgment a bar.

jurisdiction, was a final judgment between the same parties in the same relation, and adjudicated certain rights, questions and facts which were then and there in issue and on which complainant's right to recover in this suit depends.

Ransom v. City of Pierre, 41 C. C. A. 585.
Bissel v. Spring Valley, 124 U. S. 225; B. 31, p. 411.
Hinton v. MacNeil, 5 Ohio 509, *511.*
Gas Light Co. v. Zanesville, 47 O. S. 35.
Freeman on Judgments, Sec. 328.
Herman on Estoppel, Sec. 554.
Werlin v. City of New Orleans, 177 U. S. 390; B. 44, p. 817.
Townsend v. St. Louis, C. & M. Co., 159 U. S. 21; B. 40, p. 61.

Former adjudication defined.

Pac. Natl. Bank v. Miller, 124 U. S. 721; B. 31, p. 567.
Stell Co. v. Erskine, 39 C. C. A. 173.
Freeman on Judgments, Vol. 1, Sec. 330.
Daniel's Chancery Practice, Vol. 1, Sec. 696.
Thompson v. Wooster, 114 U. S. 104; B. 29, p. 105.
Herman on For. Adj., Vol. 1, Sec. 54.
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142.

In *New Orleans* v. *Bank*, 167 U. S., on page 398, Mr. Justice White, in defining *res adjudicata*, says:

"No principle of law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it is based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity and the parties are forever estopped from disputing its correctness. Cooley Const. Limit., 47, *et seq.*, and authorities there cited. 'Matters once determined in a court of competent jurisdiction may never again be called into question by parties or privies against objection, though the judgment may have been erroneous and liable to and certain of reversal in a

higher court.' Bigelow Estoppel, 3rd ed., Outline, pp. LXI, 29, 57, 103. The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause and was determined therein."

Identity of actions.

In the case of *Billings* v. *Gillmer*, 8 C. C. A. 645, *648*, the court adopts the rule stated by Mr. Freeman as the test for determining the identity of the cause of action, viz:

"When the evidence necessary to sustain a judgment for the plaintiff in the present suit would have authorized a judgment for him in the former suit the cause of action is said to be the same. 1 Freeman Judgments, Sec. 259; 2 Black Judgments, Sec. 726." See also: Werlin v. New Orleans, 177 U. S. 390; B. 44, p. 817.

Applying the rule to the case at bar it is clear the water company must offer evidence sufficient to establish a valid contract, or a contract which the city and council are estopped to dispute, and that something is now or will hereafter be due to it thereon. If these facts had been established in the suit in the state court the water company must have had a decree in its favor, hence the judgment in the state court comes within the above rule and is properly pleaded as *res adjudicata*.

Form immaterial.

It is immaterial whether the questions arise in the same form of action, or which party has the affirmative of the issue, or the burden of the proof.

Gas Light Co. v. Zanesville, 47 O. S. 35, *49*.
Norton v. House of Mercy, 41 C. C. A. 399.
Burnett v. Smith, 4 Gray, 50.
Hopkins v. Lee, 6 Wheaton, 109, *113*.
Smith v. Kernochen, 7 How. 198, *216*.
Mason Lumber Co. v. Butchel, 161 U. S. 638.
Curtis v. Cisna, 1 Ohio 429.
Green v. Bogue, 158 U. S. 478, 2nd Syl.

As to leave to file copy of final record of the case in the state circuit court.

Leave to file record.

(a) No prejudice could result to the plaintiff from the filing of this. It was simply in the nature of an exhibit to a pleading, a submission or exhibition to the court and the opposite party of the documentary evidence on which the defendants, in part at least, would rely. Profert was made of the record of the judgment to conform to a long line of cases, state and federal, of which Ford v. Jefferson Co., 4 Ia., 566, and Parsons v. Sewell, *supra*, are at the head. It was the showing that defendant's claim was made in good faith and supported by some substantial proof. It disclosed when the final decree was made, and showed that the defendants had been reasonably diligent in making their application for leave to file the plea.

Application, p. 87; leave to file, p. 88.
Transcript, pp. 148-195, printed Record.

(b) This proffered record was of no avail, unless it was offered in evidence, hence no prejudice could result.

Same.

(c) The record does not disclose any objection was made to the transcript at the time of the application, or to the sufficiency of the certificate, or that it was insufficient, but discloses that the only exception made was the general exception at the end of the order by which the *complainant excepted to the orders made without assigning any ground whatever.* The record shows that the complainant made one exception to the orders allowing the filing of the plea and the filing of the transcript, but does not show any question as to the sufficiency of the certificate, was made in the court below, and the ruling of the court asked thereon. We apprehend, under the well settled practice of this court, the complainant's alleged ground of error first imported into this case by its assignment of error will not be considered. (Rec., p. 96.)

Ausbro v. U. S., 159 U. S. 605; B. 40, p. 310.
Cornell v. Green, 163 U. S. 75; B. 41, p. 76.

See p. 17 Reply Brief

Did the court err in holding the plea sufficient in law?

The pleading sets out the facts which show the pendency of a suit in a court of competent jurisdiction between the same parties, the substance of the pleadings, viz., the petition, the answer, and the reply in that suit, that on those pleadings a trial was had on the merits and a final judgment given and rendered on the merits of the controversy as the result of that trial. The judgment so made and rendered is set forth. It is alleged that the contract in controversy in the case at bar and in the case so adjudicated is the same contract, and that the judgment so rendered, is in full force and effect, unreversed and unsatisfied. (Rec., p. 89.)

Plea was sufficient.

In *Aurora* v. *West*, 7 Wall. 82, Mr. Justice Clifford, speaking for the court, says:

"When a former judgment is set up, in bar of an action or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than other plea in bar, or in any plea in avoidance of the matters alleged in the antecedent pleading of the opposite party. Gray v. Pingrey, 17 Ver. 419; Perkins v. Walker, 19 Ver. 149,—Greenleaf Ev., Sec. 566; Shelly v. Wright, Willis, 9."

All authorities agree that a plea of former adjudication is favorably considered. Mr. Freeman says: "* * * the vocabulary of the judges has been well nigh exhausted to supply it with honorable and endearing titles." This is so, because (1) the parties are not entitled to litigate a question twice; (2) in comity, courts do not favor considering cases which have been once decided by courts of competent jurisdiction; (3) public policy dictates one adjudication is sufficient and should be final unless reversed by an appellate court, and the finality of judgments is a

Plea favored.

matter of public concern, and the courts will aid in making such judgments final.

1 Greenleaf Ev., Sec. 531.

The sufficiency of this plea is considered in the first section of this brief, page 5, *et seq.*, *ante*.

—3—

Did the court err in refusing to hear the case on all the issues joined and on all the evidence taken in the case by the water company?

Hearing on general issues refused.

This assignment predicates error in the action of the court in refusing the hear the cause upon the grounds made upon the bill as amended and the supplemental bill, the answer and replication, and the proofs offered by the plaintiff in support of said issues. It presents two distinct matters under one assignment, viz., "issues" and "proofs." It is restricted to "the proofs offered by plaintiff in support of said issues." The trial court overruled the request to hear the case on the issues and proofs filed in the case. The proofs are not printed and this court cannot say the trial court erred, because, if any part of the proofs were improper, the ruling is not erroneous. The court cannot be expected to go over the evidence taken by complainant and select out and admit its competent and material "proofs." No part of defendants' "proofs" on the general issue are in the record.

"That error will not be presumed, is a familiar and well settled general rule in appellate courts. Whoever seeks the reversal of a judgment or order, whether in a civil or criminal case, must come prepared to show by the record, not only that error has intervened, but that it has been to his prejudice. McHugh v. State, *ante*, 154. So strict is this rule, that while it is settled that a judgment will not be reversed for the exclusion of evidence, unless every material part of it was competent for the purpose stated by the party offering the same (citing cases), it is equally well settled that where evidence is

admitted against a general objection, the judgment will not be reversed for that cause, if any material part of such evidence was competent for any purpose (citing cases); and the principle is further illustrated by the rule, that where specific objections are made to the introduction of evidence, this, on error, is a waiver of all other objections in that respect (citing cases)."

Kent v. State, 42 O. S. 426, *430*, and cases.
Smith v. Arsenal Bank, 104 Pa. St. 518.
Bube v. Bull, 12 Wend. (N. Y.) 504.
Phila. & Trenton R. Co. v. Simpson, 14 Pet. 448, *459*.

We conceive that the very purpose and object of a plea of *res adjudicata* is to obviate and prevent a retrial on the merits. It would be a vain thing to plead a former adjudication if, when that were determined affirmatively for the defendant, before the court could enter judgment thereon, the parties must take testimony and the court must proceed to hear the case on the original issues and adjudicate on them. Object of plea.

Mr. Justice Gray, speaking for this court, in *Farley* v. *Kitson*, 120 U. S. 303, *315*, says:

"But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; not like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitford Pleading (4 ed.), 14, 219, 295; Story Eq. Pl., Secs. 649, 652."

Equity rule 33 declares:

"If, upon issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and in equity they ought to avail him."

This court, speaking by Mr. Justice Jackson, in *Horn* v. *Detroit Dry Dock Company*, 150 U. S. 610, *625*, says: Plea requires final decree.

"But even under this rule, when the plea meets and satisfies all the claims of the bill, it ought in law and equity to avail the defendant so far as to require a final decree in his favor."

In *Greene* v. *Bogue*, 158 U. S. 499, the rule is again considered and the court decide a former adjudication gives a defendant full protection in a case involving the principles here invoked.

Controverted questions.

We apprehend the words "all the claims of the bill," when applied to a plea of former adjudication, mean those claims essential to maintain the bill and necessary to be proven in order to obtain any relief prayed for. In the case at bar the controverted claims of the bill necessary to be proven were (1) a valid contract with the city, or (2) an invalid or unenforceable contract, the invalidity of which and refusal of payment thereunder the city is estopped to dispute; (3) that some amount is owing to the company from the city on said contract or by virtue of the contract and the estoppel.

All of these things were set up in the answer in the state court, and were determined by that court's judgment. (Rec., pp. 166 to 174.) (Rec., pp. 1 to 10.)

As illustrating the meaning and application of rule 33 we call the court's attention to the following cases in inferior courts:

Earl v. Met. St. Ry. Co., 87 Fed. Rep. 528.
Elgin Wind-pump & Power Co. v. Nichols, 12 C. C. A. 578.
See also U. S. v. C. & O. L. Co., 148 U. S. 31, *39*.

Same in state court.

But whether we are right in the view last expressed or not, all the claims in the bill were set up by the company in its answer to the city's petition in the state court, and were, or might have been litigated, and were determined in and by the judgment of the state court here pleaded as an adjudication.

See :

Water Company's Bill, Rec., pp. 1 to 10.
Amendment, Rec., pp. 25, 26.
Supplemental Bill, Rec., pp. 33, 34.
Amendment to Bill, Rec., p. 86.
City's Petition in State Court, Rec., pp. 148, 150.
Water Company's Answer, Rec., pp. 166 to 174. Reply, p. 175.
Plea of City and City Council, Rec., pp. 89 to 94.

— 4 —

Did the court err on the hearing on the plea, in refusing to hear the case on all the issues and proofs offered by the plaintiff in the case?

Complainant's proofs.

This assignment is covered by No. 3 above and by No. 6 hereafter. It relates to the refusal of the court to hear the case on the general issues, and on the water company's evidence only on the general issue.

— 5 —

Did the court err in admitting the evidence offered by defendants in support of their plea?

Admission of evidence.

(a) The evidence offered was a transcript of the record of the proceedings and judgment of the circuit court of Defiance county, Ohio, in the case of the City of Defiance, by Edwin A. Latty, its City Solicitor, v. The Council of the City of Defiance and the Defiance Water Company. (Rec., pp. 148 to 195.) (Original Rec., 247 to 327, inclusive.)

This fifth assignment of error sets forth that this transcript was objected to, (1) because it does not appear it is a complete transcript, (2) because it is not duly certified. The objections are set forth in

the decree and the only objection made in the lower court is in the words following:

"To the receiving of said certified transcript in evidence the complainant, by its counsel, objected, on the ground that it does not purport to be, and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case." (Rec., p. 98.)

Complete transcript.

The first ground of the assignment of error, that the transcript did not purport to be a complete transcript of the record of the proceedings in the state court, we think is not well taken. The law of Ohio requires a final record to be made of each case, directs when it shall be made, and what it shall contain (Secs. 5333, 5334, Rev. Stat. Ohio); but provides that the bill of exceptions shall not be recorded unless so ordered by the court for good reason and that the evidence shall not be recorded. (Section 5354.) So that, the certificate is *prima facie* a showing of a complete record when it sets out that it is copied from the final record of the case. At any rate, it shows the various things required by the Ohio statutes to be made part of the final record. (Sec. 5354.)

Ferguson v. Harwood, 7 Cranch, 408, *412.*

Entire record unnecessary.

The court below followed the ruling of the circuit court of appeals in the case of *Preist* v. *Glenn*, 2 C. C. A. 305, where an objection was made to a transcript of a record because it did not appear that it contained the entire record of the case, and the court say:

"All parts of the proceeding in that case which were essential to support the issue on behalf of the trustee in this case were included in the transcript objected to, and we can conceive of no good purpose that would have been subserved by the introduction of wholly irrelevant matter. If there were portions of the record of value to the defendant below, it was open to him to introduce; and therefore the objection urged to the record introduced, that it was par-

tial only, cannot be sustained, when it is not pointed out that any part of the record omitted was necessary to sustain the issues on behalf of the plaintiff below."

See also O'Hara v. Mobile & O. R. Co., 22 C. C. A. 512.

(b) The transcript offered by defendants, on its face, purports to be a record of the suit from the filing of the petition and issue of summons on January 4, 1898, down to May 3, 1900, the date of clerk's certificate, including the allowance of the bill of exceptions, April 4, 1901, and all the pleadings, judgments, and orders in the case, and therefore is evidence tending to support the allegations of the plea and is admissible under the principles enunciated in the cases last above cited. (Rec., pp. 148 to 195.)

Admission not prejudicial.

(c) The complainant tendered what it claimed to be and what the clerk certified is a complete transcript of the "*record, proceedings, and original papers as they appear on the records and files of the said court in my office.*" (Rec., p. 196.) In so much of this transcript as the appellant has deemed of sufficient importance to print for the use of this court there are three items which do not appear in the transcript given in evidence by the defendants in support of this plea. These items are (1) a transcript of the appearance docket entries in the state court (Rec. p. 202); (2) a copy of one paragraph from the bill of exceptions reciting the making of an oral motion by counsel for the plaintiff during the trial (Rec., p. 203), and (3) the conclusion and signature of the bill of exceptions, taken by the water company after term, in accordance with the Ohio practice. (Rec., p. 203.) The record shows that every journal entry set forth in the record offered by the water company (pages 196 to 202 inc.) is contained in the transcript offered by the defendants. (Rec., pp. 161, 163, 164, 165, 187, 188, 190, 191, 192, 193, 194.)

Docket entries not part of record.

The first item of evidence not appearing in appellee's transcript is the copy of appearance docket entries. This was an exhibit to the water company's petition in error in the Supreme Court of Ohio; and, in law and in fact, was no part of the final record of the case in the circuit court.

Secs. 5334 and 6716, Rev. Stat. of Ohio.
Moore v. Brown, 10 Ohio, 197.

The original record shows that the printed record in the Supreme Court of Ohio was used by the complainant as a copy of the record in the circuit court, without expunging therefrom the portions thereof which never were part of the record of the circuit court. Even the file marks and signature of the clerk of the Supreme Court of Ohio (p. 204), as well as other parts never in the circuit court, are thus included.

Motion immaterial.

The second item, disclosing the fact that an oral motion was made by counsel during the progress of the trial, does not embody any evidence of importance in determining the issues joined on the plea of *res adjudicta.* (Rec., p. 203.) But if it were proper the same fact is shown by the decree. (Rec., p. 192, bottom.)

The same is true as to the third item, the conclusion and signature to the bill of exceptions. (Rec., p. 203.)

No prejudice shown.

Assuming, for the purposes of the argument, that the transcript given in evidence by the city and its council was not complete, the water company has put into the record and before the court a clear showing that no prejudice resulted therefrom, by submitting what it claims to be a complete transcript and thereby showing that that transcript contained nothing material to the issues which was not included in the transcript offered by the defendants.

We conclude, therefore, that the objection that the transcript did not purport to be a complete record

of the case in the state court was properly overruled, and, even if not, no prejudicial error intervened by reason of that ruling.

The assignment of error asserts that this transcript was objected to because it was not duly certified.

The objection is set out in the decree and is in these words:

"To the receiving of said certified transcript in evidence the complainant, by its counsel, objected on the ground that it does not purport to be, and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case." (Rec., p. 98.)

Objection that was made.

No objection was made because of the certificate, and the court was not called upon to pass on and did not consider any objection based on its insufficiency. The exact question here presented was considered by this court in *Wood* v. *Weimer*, 104 U. S., 786, *795*, wherein an assignment of error was predicated on the certificate authenticating the copy of a deed. The court, speaking by Mr. Chief Justice Waite, says:

None to certificate.

"In this connection it is proper to consider the exception which was taken to the introduction in evidence of the deed from Stewart to Terwilliger. The language of the exception, as recorded in the bill of exceptions, is as follows: 'To the reading in evidence of which deed, plaintiff, by its counsel, objected, for that it was incompetent, immaterial and irrelevant.' It is now insisted that 'The attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form, and by the proper officer, as required by the act of congress of March 27, 1804 (2 Stat. at Large, 298), prescribing the mode in which the public records in each state shall be authenticated, so as to take effect in every other state.' This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality, and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here,

Cases.

unless it was brought to the attention of the court below, and passed upon directly or indirectly. It is clear that the ruling complained of in this case was in respect to the effect to be given the deed when proved, and not to the form of making the proof. We see no error in the judgment below as to this item in the claim for allowance under the mortgage."

In *Camden* v. *Doremus et al.*, 3 Howard, 515, *530*, Mr. Justice Daniel, delivering the opinion of the court, says:

"Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still, if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on; and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated in the record, whether it applied to form or substance, or how far, in the views of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court."

Cases.

Mr. Seymour D. Thompson clearly states the rule and aptly illustrates it. He says:

"Where evidence is objected to at the trial, if the party would save an objection to the ruling of the court if adverse to him, such as will be available upon appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of exceptions. He waives all grounds not so specified. The reason of the rule is

Rule and illustrations.

twofold: 1. To enable the trial judge to understand the precise question upon which he has to rule, and to relieve him from the burden of searching for objections which counsel is unable to discover, or which he sees fit to conceal. 2. To afford the opposite party an opportunity to obviate it before the close of the trial, if well taken. It is, therefore, a part of the rule that the party objecting to testimony will not be permitted to change his ground on appeal; otherwise the trial court might decide the objection on one ground; and the appellate court on another. This would produce uncertainties and injustice. Thus, it would be a monstrous rule that would permit a defendant in an action of ejectment to object to a deed, on which the plaintiff depended to make out his title on the ground that it was defectively acknowledged, and then to renew his objection to the appellate court, on the ground that it was a forgery; or that he should object to it in the trial court on the ground of irrelevancy, without stating any other ground, and should then renew his objection in the appellate court on the ground of a defective acknowledgment. Such a rule would level the appellate courts to the position of trial courts, would overturn all just conceptions of appellate procedure in cases at law, and would result in making the hearing of an appeal in such an action a trial *de novo*, without the presence of witnesses or the means of obviating errors or omissions."

Thompson on Trials, Sec. 693, Vol. 1, p. 560.
See also Hindes' Lessee v. Longworth, 11 Wheaton, 199, *209*.
Mechanic's Sav. Bank v. Harding, 70 Pac. Rep. 655.

— 6 —

Did the court err in rejecting the evidence offered by the complainant, the water company, on the issue joined on the plea?

Rejecting defendants' evidence.

This evidence was (1) the "transcript of the record, proceedings and original papers as they appear on the records and files of said circuit court in my office" in said case (Rec., p. 196); (2) the deposition of

W. A. Schmaltz, clerk of the circuit court of Defiance county, Ohio (Rec., pp. 204, 209); and (3) the transcript of the journal of the said circuit court showing the date of the adjournment of the April, 1901, term. (Rec., p. 196.)

Transcript.

(1) *The transcript.* As above shown, everything in the transcript down to May 3, 1901, had already been received in evidence (Rec., pp. 148 to 195), except the appearance docket entries in the circuit court (Rec., pp. 202, 203), the portion of the bill of exceptions showing the fact that an oral motion had been made by counsel for the city during the progress of the trial in the circuit court (Rec., p. 203), and the concluding paragraph of the bill of exceptions and the signatures of the circuit judges to said bill. (Rec., pp. 203, 204.)

Appearance docket entries.

The appearance docket of the court is provided for by Section 4957, and what it shall contain by Section 4958 of the Revised Statutes of Ohio, which sections are as follows:

"Section 4957. The clerk of the court of common pleas shall keep at least five books, to be called the appearance docket, trial docket, and printed duplicates of the trial docket, for the use of the court and the officers thereof, journal, record and execution docket, and an index to the trial docket, and the printed duplicates of the trial docket and journal direct, and to the appearance docket, record and execution docket, direct and reverse."

Same.

"Sec. 4958. The clerk shall enter on the appearance docket, at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case, direct and reverse, in the name of each plaintiff and defendant; he shall also enter, at the time it occurs, under the case so docketed, the issue of the summons, or other mesne process or order, and the filing of each paper; and he shall record in full the return on such writ or order, with the date of its return to the court, which entry shall be evidence of such service."

The final record of causes is provided for by sections 5332 and 5333, and what it shall contain by section 5334, Revised Statutes of Ohio, which sections are as follows:

"Sec. 5332. The clerk shall make a complete record of every cause as soon as it is finally determined, unless such record, or some part thereof, be duly waived." Final record.

"Sec. 5333. The clerk shall make up such record in each cause in the vacation next after the term at which the same was determined; and the presiding judge of the court shall, at the next term thereafter, subscribe the same."

"Sec. 5334. The record shall be made up from the petition, the process, the return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if items of an account, or copies of papers attached to the pleadings, are voluminous, the court may order the record to be made abbreviating the same or inserting a pertinent description thereof, or by omitting them entirely. The bill of exceptions shall be filed with the pleadings and papers, but not recorded, unless the court for good reasons shall so order; and evidence must not be recorded."

From these sections it is plain that the appearance docket is not part of the final record. Indeed, everything in the appearance docket was already shown by the complete record given in evidence by the defendants below, so that if the appearance docket were part of the record the failure to admit the copy in evidence was not prejudicial. The appearance docket is simply a book kept to enable the court, its officers and others interested to conveniently determine the pendency and progress of any cause without leafing over the files and journals of the court. It is only the clerk's memorandum of his understanding of the action of the court, and is not even secondary evidence.

Roberts v. Brisco, 1 O. C. C. 577.
Approved on this point in 44 O. S. 596, *599*.

Papers and files no part of record.

The portion of the transcript of the *record, proceedings and files* which shows that an oral motion was made by counsel for the plaintiff, the City of Defiance, during the progress of the trial, we believe, was not under the law part of the record, and not an essential or material part in connection with the issues touching the plea of former adjudication on hearing in the circuit court. But, be that as it may, the final decree in the case showed the same thing, so that no prejudice could possibly have resulted from the rejection of this item. The court, in its final decree, finds "that the motion of the said plaintiff, made at the time the said defendant rested its case, for a finding and decree in favor of said plaintiff, etc." (Rec., p. 192, bottom.)

What is said of this is equally true of the concluding part of the bill of exceptions and signatures thereto.

But it does not appear that this evidence was competent for another reason. The certificate shows the paper offered is a transcript of the "record, proceedings and *original papers* as they appear on the records and files in my (the clerk's) office." Section 905 does not provide for copies of "*original papers*" "*on file*," but for copies of records. In Ohio copies of original papers can be used only where it affirmatively appears the record is not made up.

> Lessee of Morgan v. Burnett. 18 Ohio, 535, *545*.

The proceedings of a court must be proved by its record if a record is made up. There was no showing that this was part of the record and no showing the record was not made up.

> State v. Dawson, 6 Ohio 251, *253*.
> Noble v. Shearer, 6 Ohio 426, *427*.
> Young v. Buckingham, 5 Ohio 485.

(2) *The deposition of W. A. Schmaltz.* By the oral testimony of the clerk of the court, the Defiance Water Company sought to show that the judgment of the circuit court of Defiance county, in a suit in which it was a party, was not entered on the journal on the day of which it bears date, but was furnished by the judges afterward and by their direction entered as of the date the judgment was actually rendered. **Schmaltz's deposition.**

As between the parties the date of the record of a judgment, when shown on its face, is no more subject to dispute by oral evidence than is the amount of the judgment.

"The verity of a record applies to its date, and therefore evidence is not admissible to show that the date of the judgment as it appears in the judgment book and docket is incorrect." **Record not disputable by parties.**

Freeman on Judgments, Vol. 1, Sec. 76.
The State ex rel. v. The Judges, 53 O. S. 430.
Ferguson v. Kumler, 25 Minn. 183.
Morton v. W. U. Tel. Co., 53 O. S. 430.
Steinberger v. Steinberger, 19 Ohio, 106.
Hoagland v. Schnorr, 17 O. S. 31.

This is the rule in Ohio, notwithstanding Heirs of Ludlow v. Johnston, 3 Ohio, 553, which is sometimes cited as the single exception to this rule.

Jacks et al. v. Adamson, 56 O. S. 397, *401.*

The question has lately been exhaustively discussed by the Ohio Supreme Court in *Coe* v. *Erb*, 59 O. S. 259.

(3) *Adjournment of the circuit court sine die.* The fact that the court adjourned without day on March 15, 1901, is of no moment if the date of a judgment can not be disputed by a party to it. **Date of adjournment of court immaterial.**

The theory, on which the evidence referred to in this and the next preceding paragragh is offered, is that a judgment of a court is void, even as to a party

to the judgment, unless the entry thereof is written in the journal of the court during the term. We submit that the judgment shown by the record given in evidence by the defendants is *prima facie* valid. *Ferguson* v. *Harwood*, 7 Cranch, 408. To overcome the presumption of its validity created by the record of the judgment, assuming evidence to be competent to disprove it, it is not enough that the entry of the judgment was not written in the journal during term, but evidence must be produced tending to show such judgment, in fact, was not rendered of that date, or during term, but see printed record, p. 211, middle. Otherwise, the judges of the court would have to announce their opinions, thereby supplying *data* for clerk or counsel to prepare entries and then wait until the clerk had time to copy them into the journal before adjourning court in order to make the judgment of the court in force even between the parties.

Judgment actually rendered on date named.

When this contention was presented to the Supreme Court of Ohio, in the proceedings in error taken by the water company to reverse the judgment pleaded as a former adjudication, that court struck it out of the petition in error and refused to consider it.

—7—

Plea sustained.

Did the court err in its opinion and finding that the plea should be sustained?

Error cannot be assigned on the opinion of the court.

Evans v. Suess O. G. Co., 28 C. C. A. 24, *27*.
North Am. Loan & Trust Co. v. Col. Mtg. Co., 28 C. C. A. 88.
Natl. Mas. Assoc. v. Sparks, 28 C. C. A. 399, *403*.
Russel v. Kerns, 16 C. C. A. 154.

The finding depends on the correctness of the determination of the questions above considered, and, if any were incorrectly decided, whether prejudice to the appellant resulted from such rulings, and whether the evidence established that the adjudication in the state court was by a court of competent jurisdiction, that the judgment was on the merits and was a final judgment and that it was based on and decided the issues involved in the case at bar, or some issue or fact which the complainant must establish to entitle it to any relief in this suit.

The correctness of the court's ruling and whether prejudice resulted therefrom need not again be discussed.

State court.

We believe this court takes judicial notice that the circuit court of Defiance county, Ohio, was a court of competent jurisdiction.

Hanely v. Donahue, 116 U. S. 1, 7.
N. Y. Fourth Natl. Bank v. Franklin, 120 U. S. 747.
Millis v. Green, 159 U. S. 651; B. 40, p. 293.

That the judgment was on the merits is shown by the transcript. (Rec., pp. 148, 195.)

Final judgment.

That the judgment was a final judgment under the laws of Ohio, that it can be reviewed only by the Supreme Court of the state, that such review is by "*proceeding in error*," that the judgment stands in full force and effect during the pendency of said error proceedings, which does not, of itself, even stay execution on such judgment, but such stay can only be obtained by giving bond in accordance with the Ohio statutes, and that such bond leaves the judgment still in force but temporarily suspends execution thereon, are facts so well established by the statutes of Ohio as not to require discussion.

On the merits.

In *Sharon* v. *Hill*, Judge Deady lays down the rule that the force and effect to be given to a state judgment by a federal court is prescribed by the act

of 1790 (Revised Statutes, 905), which provides, "*the records and judicial proceedings of the state courts shall have such faith and credit given them in every court within the United States as they have by law and usage in the courts in the states from which they are taken.*" This rule is recognized in the recent case of Hilton v. Guyot, 159 U. S. 113, *182*. See also, Hancock Natl. Bank v. Farnum, 176 U. S. 640; B. 44, p. 619. So that to determine what effect is to be given to an Ohio judgment by a federal court we must determine what effect is given to it by the law and usage of the Ohio courts.

Credit due to state decisions.

In *Lessee of Taylor* v. *Boyd*, 3 Ohio 338, at page 354, the court says:

"It is contended that a writ of error is but the continuance of the original suit, and like a bill of revivor, or an appeal, reinstates the suit, and refers all parties and things involved, to its first commencement. We do not concede that such, in all cases, would be the consequence of a bill of revivor or of an appeal. But in this case we think the analogy does not hold. In the obvious nature and character of the proceedings a writ of error is a new and original suit. Original process issues in it and must be served to bring the adverse party into court. The relative character of the parties is changed; new pleadings are made up, and a final judgment upon it, though it may operate upon the original cause, is nevertheless a termination of the new suit or process in error. We do not meddle with the nice distinctions, by which a writ of error has been treated as a defensive proceeding, and a continuance of the cause in which the party alleged he had been prejudiced by an erroneous judgment. Though this proposition has been urged *arguendo*, in the most respectable tribunals of our country, we are not apprised of any case where it is made a ground of decision. We adhere to the doctrine that the writ of error is a new suit."

Ohio rule.

In *Ludlow* v. *Kidd*, 3 Ohio 541, the court held a decree against infants is final, though they have rights after they become of age to attempt to reverse by a bill of review. The court hold the review

Same.

or error proceedings are new suits and not a continuance of the former suit.

A judgment is valid for all purposes till actually set aside or reversed.

Valid till actually reversed.

Lagrange v. Ward, 11 Ohio, 258.
Berry v. Greenfield, Wright, 348.
Goodrich v. Jenkins, Wright, 349.
Piatt v. Piatt, 9 Ohio, 37.

"An erroneous decree in chancery where a court has jurisdiction is binding between the parties until reversed."

Welsh v. Childs, 17 O. S. 320.

The latest cases likewise hold that the parties are concluded by a judgment of a court of competent jurisdiction in Ohio, until the judgment is *reversed or set aside.*

Hixson v. Ogg, 53 O. S. 361.
Cincinnati v. Emerson, 57 O. S. 139.
Heck v. Window Glass Co., 16 O. C. C. 111.

In this last case the judgment was pleaded by supplemental answer, and the court holds:

Error proceedings do not vacate.

"Until reversed for cause a judgment not only binds the parties to the action, but it settles the status of property in controversy."

The whole doctrine was discussed in *Cadwallader v. Evans*, 1 Disney 585, and the Ohio cases reviewed, and the court say:

"It is well settled that the judgment is valid until it is directly adjudicated by reversal before an appellate or superior tribunal. No collateral inquiry will be permitted as to the mode pursued by the court rendering the decree. All parties are forever concluded while the decree stands."

Cadwallader v. Evans, 1 Disney, 585, 590.

So far as we are able to find there are no Ohio decisions opposed to these. So that the rule which

obtains in the federal courts and in all the state courts, but one or two prevails in Ohio.

Ransom v. City of Pierre, 41 C. C. A. *588.*
Railway Co. v. Townbilby, 100 U. S. 78, *81.*

Following the rule above quoted from Sharon v. Hill, as the rule adopted by the federal court, the court need look no further than to learn what force or effect is given to an Ohio judgment by her own courts.

Pleadings and judgment.

Were the questions necessary to be decided to entitle the water company to relief in the case in the federal court in controversy in the state court, and were these questions or any of them decided in the state court? This can be determined only by examining the pleadings in the two cases and the judgment in the state court. In federal court, bill, pp. 1 to 10; amendment, 25, 6; supplemental bill, 33, 34; amendment, 86; answers, 52, 56; replication, p. 80; plea, p. 89; replication to plea, 97.

In state court, petition, pp. 148, 150; answer, 166 to 174; reply, 175 *et seq.*; final decree, Rec., p. 192.

It is worthy of note in this connection, that, when the court of common pleas of Defiance county sustained the water company's demurrer to the city's petition and dismissed the case, the water company, by supplemental bill in the U. S. circuit court, pleaded that adjudication as a final adjudication in its favor. (Rec., p. 33.) But in due time this judgment was appealed from and the matter so pleaded thereby set at large. (Rec., p. 33; Rec., p. 164.) Thereupon the water company filed its answer in the state circuit court and averred among other things that if the case in the state court were decided adversly to the water company it would prevent any further proceedings in this case and end and determine this action. (Rec., p. 174.)

Plead as ad judication by complainant.

See cases cited at pages 6 and 8 of this brief.

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Did the court err in its order refusing to hear the cause upon the issues formed by the bill as amended, supplemental bill, answer and replication thereto to which defendants' plea did not reach, and as to which the said plea ought not in law or equity to avail the defendants: and did the court err in overruling the plaintiff's request and motion for leave to give in evidence its proofs filed in support of said issues?

What is said in the first paragraph of this argument (p. 4), and in regard to the third and fourth assignments of error (*ante*, pp. 12 and 15) is equally applicable here.

If this assignment charges that the plea does not reach any issues tendered by the bill and amendments it is a reiteration of the assignment as to the sufficiency of the plea; and if even one issue was reached by the plea the court did not err in rejecting evidence offered in a mass on all issues.

Assignment insufficient.

If it charges that the plea did not reach some issues and the evidence as to them should have been received, it is insufficient because founded on no objection or request by which the attention of the lower court was called to those particular issues and it given an opportunity to rule on a specific question. The assignment does not point the court to any particular issues, but specifies them as "those to which the plea does not reach," and "those as to which the plea ought not to avail," without indicating which issues it means by "those to which the plea does not reach and ought not to avail," and offering evidence on them. It seems to us such assignments are no better than if a party should say the court erred in admitting evidence which ought to have been rejected.

Issues not reached.

If we can read the bill and amendments and answer thereto in the federal court and the petition and answer and reply in the state court and the plea in the federal court, every material issue in the federal court is shown by the pleadings to have been in controversy in the state court; and that the plea sets forth the pendency of a suit in a court of competent jurisdiction, between the same parties as those in the case at bar, that all the matters in controversy in the case at bar were at issue in that case; that a trial of said issues was had on the merits thereof in said state court and a final judgment was rendered thereon in favor of said city of Defiance and against said council and said water company, whereby said issues therein, which included all the matters in controversy in this case, were adjudged and decided in favor of said city and against said council and said water company.

If controlling question decided.

If every issue tendered by this bill were not duplicated by some issue joined by the pleadings and decided in the state court: yet if any material matter, without proof of which the water company could not have a decision and decree in its favor, was in issue and was decided adversely to the water company in the state court, decision on that issue is sufficient to determine the whole matter and constitute a complete bar.

Aetna Life Ins. Co. v. Board Comrs., 117 Fed. Rep. 82.

Bissel v. Spring Valley, 124 U. S. 225, 236.

The opinion of the circuit judge in allowing the plea to be filed states the matter very clearly and we refer the court to page 88 of the record.

In the case at bar one thing is essential to the complainant's right to recover, viz.: a contract with the city valid and binding in its inception; or a contract with the city so fortified by estoppels as to make it enforceable and payments under it proper.

In the case in the state court the court found and decided:

"That the said contract of August 17, 1887, attempted to be made and entered into by and between the City of Defiance and Samuel R. Bullock & Company, under which the said defendant, The Defiance Water Company, claims, and which is the contract and ordinance mentioned and referred to in the petition of said plaintiff and the answer of said defendant water company, was, and is unauthorized, in contravention of the law, prohibited, illegal and void, and that the said council of the city of Defiance was without power or authority to make the same or to pay money to said water company under said contract, and that the payment for water under said contract would be a misapplication of the funds of the city, and that all such payments and the execution of said contract should be perpetually enjoined and that said plaintiff is entitled to the relief in its petition herein prayed for; * * *" (Rec., p. 193.)

Contract is essential.

The jurisdiction of the federal court depended on the existence of a valid contract and the passing of a law (ordinance or resolution) impairing its obligation. If there were no valid contract there could be nothing to impair.

Jurisdiction depended on.

Trustees of Bishop Fund v. Ryder, 13 Conn. 86.
Baker v. Town of Union, 44 N. J. Law, 259.
Fitzgerald v. Grand Trunk Ry. Co., 13 Law Rep. Ann., 70.
Same case, 63 Vermont, 169.
Synod of Dakota v. So. Da., 14 Law Rep. Ann., 419, *421*.

We think complainant's bill and the answer, pp. 64-69, showed lack of jurisdiction which this court should recognize as soon as called to its attention.

Boston & M. etc., Co. v. Montana, etc., Co. (Sup. Ct.) Dec. 3, 1902, adv. sheets Co-op. Pub. Co. No. 9, pp. 434, 437, *et seq.*

When the illegality of this contract appeared and that there could be no impairment of it the federal court could not retain jurisdiction of the case but was bound to forthwith dismiss the suit.

Opinion Judge McClain, Butler v. Penn., 10 How., 402, *419*.
Robinson v. Anderson, 121 U. S. 423.
Shreveport v. Cole, 129 U. S. 36, 44.
St. Paul v. St. Paul Gas Co., 181 U. S. *142*.
Little Gold Mining Co. v. Kees, 96 U. S. 199, *203*.

Review by error to state court.

True, the federal court decides for itself the question of impairment; but when that question has been decided adversely in a state court so as to constitute *res adjudicata* it must reach the federal court of last resort by a review of the judgment in the state court in which the decision which constitutes the former adjudication was rendered.

Allen v. Allen, 38 C. C. A. 336.
New Orleans v. Benjamin, 153 U. S. 341.

The principles governing this question have been so aptly stated and such judicious selection of a few leading cases made by the circuit court of appeals in two very recent cases, that we refer the court to those decisions and the cases cited:

Aetna Life Ins. Co. v. Board Comrs., 117 Fed. Rep. 83.
Union Savings & Loan Assn. v. Byrne, 52 C. C. A., p. *465*.
See Dowell v. Appelgate, 152 U. S. 327.

Evidence offered not printed.

Again: The water company tendered all its evidence taken on the general issue; if any was incompetent or immaterial and was properly rejected the action is not ground for reversal. The presumption is the judgment of the lower court was right, and, we apprehend, an appellate court is not called upon

to examine evidence not printed to see if there was any of it which should not have been rejected.

Kent v. State, 42 O. S. 426, 430.

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Did the court err in holding that said plea extended to the whole of the issues joined in the circuit court; and that it was conclusive thereof?

Did the said court err in its final decree in favor of the defendants and in dismissing the suit with costs to said defendants?

This depends on the solution of the questions presented by the first, second and seventh assignments above considered.

Here again no one or more issues are pointed out and objection made to the court's ruling as to that, and assignments based on specific rulings.

If the plea was properly sustained and finding and judgment proper for the defendants, it is immaterial whether the findings and reasons therefor were right or wrong. If the plea was properly sustained as to any issues or issue which were conclusive as to the water company's right to recover in the suit at bar a finding that the plea was conclusive of all the issues was justified, and a final judgment dismissing the water company's bill and for costs against it was proper.

Finding and judgment was justified.

See cases cited, pp. 5, 6, 8 and 9, *ante.*

Several grounds have been suggested as the basis of the claim that the judgment in the state court was not conclusive.

It is said that the suit in the federal court was on a question of a quantum meruit and this issue was not made in the case in the state court.

The city, by its solicitor, in the state court, averred the council was treating the contract a

Quantum meruit.

valid and intending to pay the full amount claimed by the water company on it, and set forth the facts which made the contract void and any payments under it illegal. These last facts were denied by the water company, thus making a clean-cut issue as to indebtedness. As we understand it, there is no issue of an implied liability tendered in the circuit court. The suit is on an express contract, with averments of fact and of legal conclusions which it is claimed estop the city and its council from asserting the illegality of the contract or refusing to pay the amount claimed under it. The averments are in almost the identical words as those in the answer in state court.

For another controlling reason this position is untenable. A party cannot, in a single cause of action at one time, maintain a suit for the same relief on both an express and an implied contract.

Creighton v. City of Toledo, 18 O. S. 447, *452*.
Abbot v. Inskip, 29 O. S. 59, *61*.
White v. Merrill, 16 Am. Dec. 238.
King v. Woodruff, 60 Am. Dec. 625, *628*.
Mass. v. Fairbanks, 37 Am. Rep. 303.
Chase v. Railway Co., 97 N. Y. 384.
North v. Nichols, 37 Conn. 375.

No quantum meruit till contract repudiated.

Again, we submit, this claim is not well founded because the adjudication that the contract is illegal, prohibited by express statute, and void, bars the water company from any action in any form under which it is necessary to aver or prove the illegal contract. No action on a *quantum meruit*, either at law or equity, can be maintained unless the illegal contract is repudiated.

Pullman Pal. Co. v. Cen. Tran. Co., 171 U. S. 138.
S. C., 139 U. S. 62.
Pitts., etc., Ry. Co. v. Keokuck B. Co., 131 U. S. 371.

MacMullin v. Huffman, 174 U. S. 638.
Logan Co. v. Townsend, 139 U. S. 67, 77.
Dis. of Col. v. Bailey, 171 U. S. 161.

In the last case the prohibition was in almost the identical words as that in the Ohio statutes.

Identity of parties.

It is said the two suits are not between the same parties in the same right, because the city's suit was brought by its solicitor.

Section 1777, Ohio Statutes, requires the city solicitor to apply *in the name of the city* for an injunction to restrain (1) the misapplication of the funds, (2) the abuse of the corporate powers, (3) the performance of any contract made in behalf of the corporation in contravention to law, (4) the forfeiture of any contract which is contrary to law.

Council a proper party.

No less than eleven times in its answer in the state court the water company refers to the city as "the plaintiff" in the suit; and alleges the pendency of this suit in the federal court and avers it is between the same parties as the suit in the state court. (Rec. p. 174.)

Section 1678 of the Revised Statutes of Ohio provides the council shall have the management and control of the finances and property of the city.

Section 1693 provides contracts, agreements and obligations can only be made by ordinance or resolution of the council.

By section 1693 all money must be appropriated and ordered paid by ordinance of the council.

So that this seems to us to be one of those cases mentioned by Judge Caldwell in Herrick v. Cleveland, "where it is proper to bring suit against the council." The record from the state court shows the council employed attorneys, who appeared and took part in the case (Rec. p. 156), and that, finally, a decree was entered against the council and the water company enjoining any action or proceeding being taken by the council to pay the water company's claims, or the further carrying out of this contract.

(Rec. p. 192.) As stated by Judge Wanty on the motion to make service on the new members of the council:

Same.

"The council as a body must act in order to bind the city in any manner. The individual members as individuals are not proper parties, but the council as a body or board is a necessary party, being the seat of power from which emanates the acts, the performance of which is sought to be compelled or prohibited."

Sections 6756 and 6757 recognize the right of the city council to be sued and for judgment and orders to be made against it, when municipal action touching financial matters is to be controlled by the court under the law.

In *State ex rel.* v. *The City of Cincinnati and the Council of Cincinnati*, the council was sued, answered, and judgment was rendered against it by the Supreme Court of Ohio. (19 Ohio, 178.) This was followed in 54 O. S. 631.

Solicitor's suit.

It is said the city, as represented by the city solicitor, in the suit to enjoin the performance of an illegal contract, is in a different relation from the city when sued by the water company to compel the performance of the same contract. That the city, in whose behalf the suit is brought, under Sec. 1777, is not the city in the same right that makes the contract. The statute is against this view. The power which has the right to make the contract is the one that has the right to see it legally performed or to prevent the performance of an illegal contract or the payment of money thereunder. Municipal corporations have but two relations, governmental—legislative and public, and proprietary—private. In the first it represents the state, and makes no contracts, enforces none. In the second, it makes contracts and looks after all its proprietary interests. These views are confirmed by our courts in:

City's relations.

Toledo v. Gas Co., 5 Ohio C. C. 557.
Cincinnati St. Ry. v. Smith, 29 O. S. 291.
Cincinnati v. Cameron, 33 O. S. 336.
Knorr v. Miller, 5 Ohio C. C. 609, *614*.

The state court clearly had jurisdiction of the subject matter and the council was served and appeared in the case. On its motion, the cause was remanded from the federal to the state court on the ground that the state court and not the federal court had jurisdiction of the parties, and of the subject matter. No objection was ever made, either by demurrer or answer, that there was a defect of parties defendant, hence, under Section 5064, all such questions were waived. (Tootle v. Coleman, 107 Fed. Rep. 41, 4th Syl.) At any rate, the party is the same and by the same name as that in the suit in the federal court. Suppose a judgment were rendered in this suit ordering the council to allow and the city to pay the water company's bills, the council and the city would be in an unenviable position if they should refuse to obey the court's order under a claim that the federal court had no jurisdiction to make an order against the council. That the person holding an office is not named is an immaterial omission, as adjudged in:

Question waived and decree final.

Bridge Co. v. Mayer, 31 O. S. 317, *323*.

It is said the federal case involves a charge by the water company of collusion and conspiracy between the city solicitor and the council and for that reason the doctrine of *res adjudicata* has no application.

Issue of collusion no bar to plea.

It cannot be that because collusion and conspiracy in the bringing of the first suit is charged, the adjudication is any less a bar, while the judgment there entered stands.

Wilson's Ex. v. Dean, 121 U. S. 525, and cases cited.

Same issue in state court.

The same charge of conspiracy was alleged as a defense in the answer in the suit in the state court as is charged in the bill in the federal court. An issue was joined on that answer, tried, and decided adversely to the water company. The rule is "*every right, question, or fact, distinctly put in issue and directly determined * * * is res adjudicata.*" There are no exceptions as to the character of the suit or the nature of the facts, right or question; an issue as to fraud or conspiracy is as finally adjudicated as an issue as to the execution of or amount due on a promissory note.

Indeed, the charge of fraud or collusion is not available here to weaken the effect of the judgment in the state court.

Union Trust Co. v. Rochester, 29 Fed. Rep. 609, and cases.
Peninsular Iron Co. v. Eells, 15 C. C. A. 190.
K. C., F. S. & M. R. Co. v. Morgan, 76 Fed. Rep. 429, *434*.
Christmas v. Russell, 5 Wall. 290.
Hilton v. Guyot, 159 U. S. 113, *185*.
Anderson v. Anderson, 8 Ohio 109.
Knapp v. Thomas, 39 O. S. 377, *387*.

There is no claim that the state court was procured to assume jurisdiction or that the water company was prevented from making defense by fraud of defendants or either of them. The water company made the same charge and it was decided against it in the state court. (Rec., p. 173.)

Judgment may be plead any time before judgment.

It is contended that the judgment in the state court was entered after issues were made up in the federal court and hence comes too late.

Mr. Van Fleet adopts and quotes the following, as the law pertinent to this subject:

"Even in cases wherein the judge has commenced the trial of an issue, which is also an issue in a pending litigation, a final judgment pronounced

meanwhile in the previous litigation should operate as *res adjudicata*, preventing the judge dealing with the latter litigation from adjudicating differently. If this is not done, the evil against which *res adjudicata* aims will not be removed and the doctrine itself will be defeated."

Vol. 1, page 90.

In the case of Duden v. Maloy, 43 Fed. Rep. 307, this rule was adopted where a judgment was rendered after a master had made his report.

It is said the overruling of defendant's demurrer to the water company's bill settles all questions as to the sufficiency of the contract in controversy and that question was no longer open in the federal court and the decision of the state court of no moment.

Interlocutory ruling on demurrer.

In Foster's Federal Pleading & Practice, it is said: "*An answer may contain defenses which have been previously raised by plea or demurrer, and overruled.*" Vol. 1, Sec. 144. See last paragraph of opinion of Mr. Chief Justice Taney, in *Rhode Island* v. *Mass.*, 14 Pet. 210, *262*.

Mr. Daniels gives the same rule and in a note says:

"On the overruling of a general demurrer it would be error to enter a final decree without giving defendant an opportunity to answer."

Daniel's Chanc. Prac., Vol. 1, 628.

It is only when a final judgment is rendered on demurrer that matters involved are finally adjudicated.

Price v. Coleman, 22 Fed. Rep. 694.

In the American & English Enc. of Law the author cites several authorities to this point, and says the proposition is so manifest that further citations are unnecessary.

A ruling on a demurrer is only an interlocutory order unless final judgment or decree is made and entered. Merwin, 564.

Bennet v. City of Louiville, 62 S. W. Rep. 1041 (Ky.).
Linder v. Lewis, 4 Fed. Rep. 318.
Clarke v. Blair, 14 Fed. Rep. 812.

Same.

In *Fournquet* v. *Perkins*, *16 How. 82*, *86*, counsel objected to a decree entered on hearing of exceptions to the master's report, because it was adverse to the opinion and order formerly announced by the court on hearing. In overruling this objection Mr. Justice Taney says:

"The case was at final hearing at the argument on the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. This court so decided when the former appeal hereinbefore mentioned was dismissed for want of jurisdiction. And if the court below, upon further reflection, found that it was in conflict with the decision of this court, it was its duty to correct the error."

This was followed in a ruling on a demurrer in:

Wooster v. Handy, 21 Fed. Rep. 51, *53*.

See also:

Baldwin v. Creed, Wright's Rep. 729 (Ohio).
Holbrook v. Connelly, 6 O. S. 199.
Krouse v. Streicher, 15 O. C. C. 199.

Ruling on demurrer not final.

Linder v. Lewis, 4 Fed. Rep. 318.
Clarke v. Blair, 14 Fed. Rep. 812.
Reeves v. Keystone B. Co., Fed. Cases, No. 11,661.
Breedlove et al. v. Nicolet, 7 Pet. 413, last Syl.

Mr. Chief Justice Waite, speaking for the court, in Alley v. Nott, says:

"A demurrer * * * when tried will finally dispose of the case as stated in the complaint, on its merits, unless leave to plead over or amend is granted. * * * And if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

Alley v. Nott, 111 U. S. 473; B. 28, p. 490.

Mr. Van Fleet says:

"A judgment rendered for the plaintiff for *want of answer*, upon overruling a demurrer to his complaint for want of merits, will make the matter *res adjudicata*."

Van Fleet on Former Adjudications, Sec. 304.

Mr. Freeman says:

"If a demurrer is overruled, *and a judgment thereupon entered, it is on the merits, and it is necessarily conclusive*, in favor of the party against whom the demurrer was interposed, of the material facts confessed thereby, and that they entitled him to the relief given. The judgment is as effective as an estoppel as though the facts had been put in issue and established by a verdict."

Without judgment thereon.

Freeman on Judgments, Sec. 267, p. 483.

The Supreme Court of South Carolina, speaking by Chief Justice Smith, says:

"A demurrer to the merits of a complaint or other pleading overruled and followed by a final judgment, is decisive of all the material facts charged and is conclusive of them."

Johnson v. Pate, 90 N. C. 334.

Mr. Justice Field says:

"The final judgment entered upon that demurrer is a bar to any further action upon the specific coupons in suit. * * * If the party against whom a ruling is made on demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, *he should seek to amend*

his pleading or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission the inference may be justly drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading."

Bissell v. Spring Valley, 124 U. S.; B. 31, p. 413.

In *Scherff* v. *Railway*, 26 Am. Rep. 828, speaking of a demurrer to a bill where leave to amend had been allowed upon demurrer sustained, and where plaintiff did not amend but afterwards voluntarily dismissed his petition, the court say:

Same. "Yet the leave to amend takes from the judgment that quality of finality which is necessary to make it an estoppel, and thus 'sets the matter at large.'"

So we take it, if the demurrer is overruled and leave given to answer, the leave to answer "sets the matter at large," and as stated by the court in the last case, it is an interlocutory judgment. In all such cases the decision which is binding and has the force of *res adjudicata* is a final judgment on the demurrer, terminating the litigation in the court making the adjudication.

Williard v. Ostrange, 32 Pac. Rep. 1092 (Kansas).

In *Fuller et al.* v. *Knapp et al.*, a demurrer on the ground of want of equity was filed to the bill, argued the demurrer overruled, and the defendants given leave to answer, whereupon the defendant answered and at the same time demurred again to the whole bill. Judge Wallace, on deciding a motion to remove the demurrer, says:

"A defendant cannot, at the same time, answer and demur to the whole bill, though he may demur to part and answer to the residue. Equity Rule 32.

After a demurrer has been overruled, a defendant may insist upon the same matter by way of defense in his answer."

Fuller et al. v. Knapp et al., 24 Fed Rep. 100,

It is urged the ruling on the demurrer is the law of the case, and controls the action of the court.

Law of the case.

"Law of the case," means only the decision on appeal or error by the appellate court.

VanFleet on For. Adj., pp. 1307 and 1308.

The judgment must have been in another case. Mr. Van Fleet says:

"It is necessary, however, that the decision must have been in another suit, as the doctrine of *res adjudicata* has no application to decisions in former stages of the same suit."

Van Fleet on Res Adjudicata, p. 90, Sec. 24.

Ruling on demurrer not plead in state court.

If the ruling on the demurrer was a judgment which finally adjudicated the construction of the statute and contract, its use for that purpose was waived by failure to plead it in the state court. On this subject the author last quoted says:

"The last judgment rendered in regard to a matter is *res adjudicata*. The former judgment must be used to prevent it. It calls upon the adverse party to show all his reasons why it should not be rendered; and one of his reasons is that another court has determined the matter. But if he does not bring that fact to the attention of the court, or if he does do so and it is disregarded, in either case the former judgment, the same as all other defenses, is concluded."

Van Fleet, Res. Adj., p. 91, Sec. 24, last par.
Cooley v. Prayton, 16 Ia. 10, 18.
Baterman v. Railway Co., 96 Mich. 441.
Same Case, 56 N. W. Rep. 28.

The ruling on the demurrer is adverse to a ruling of the Supreme Court of Ohio on a statute passed the same day as the one in question and in the same words, except that it relates to gas instead of water companies, and against the decision of the circuit court of appeals in an Ohio case on the same subject, and against numerous other decisions of the state and federal courts, with no decision supporting it under a like statute. The statutes are: 83 O. L. 146; 82 O. L. 261; 82 O. L. 262.

Ruling contrary to Ohio and other cases.

City of Wellston v. Morgan, 59 O. S. 147.
Manhattan Trust Co. v. Dayton, 8 C. C. A. 140.
Gas Light and Coke Co. v. City of New Albany, 59 N. E. Rep. 176.
Beeson v. City of Chicago, 75 Fed. Rep. 881.
Brazonia v. Youngstown Bridge Co., 25 C. C. A. 306.
Litchfield v. Ballou, 114 U. S. 190.
Trust Co. v. Galesburg, 133 U. S. 156, 5th find. app.
Hedges v. Dixon Co., 156 U. S. 182, *192*.
Sullivan v. Bailey, 83 N. W. Rep. 996 (Mich).
Davis v. Harrison, 46 N. J. Law, 79.
Barrie v. Earl, 143 Mass. 4.
Taylor v. Lambertville, 10 Atl. Rep. 809.
Somerset v. Smith, 49 S. W. Rep. 456.
Logansport R. R. Co. v. City of Logansport, 114 Fed. Rep. 688.
Puney v. Milwaukee, 84 N. W. Rep., 22 (Wis.).
Jones v. Seattle, 38 Pac. Rep. 682 (Wash.).
Trestner v. City of Sheboygan, 58 N. W. Rep. 746 (Wis.).
McAleer v. Angell, 36 Atl. Rep. 538 (R. I.).
Mealy v. Mayor of Hagerstown, 48 Atl. Rep. 746 (Md.).

City of Ft. Scott v. Eads Bridge Co., 117 Fed. Rep. 51. (C. C. A.)
State v. Board St. Comrs., 26 Atl. Rep. 92 (N. J.).

Statute relied on construed.

The very words of the statute relied upon by appellant as authorizing the contract had been construed by the Supreme Court of Ohio.

State v. Clerk of Chillicothe, 7 O. S. 147.

The rule is that the legislature used these words, in the statute afterward passed, with reference to and in accordance with the construction so given them.

Grogan v. Garrison, 27 O. S. 50, 59.

A reversal would not be equitable.

It would be a monstrous doctrine if a party, after the most diligent efforts at every stage of the proceedings to obviate a conflict of authority, should be subject to a mandatory order of the federal court to carry out, perform, and pay money under a contract, and an equally authoritative and imperative order of the state court not to perform, carry out, or pay money under the same contract; and by reason of which orders the litigant could not obey one without being in contempt of the other.

It would be ground of just reproach to our system of concurrent state and federal jurisdiction, if, to a party who is dragged against his will into both forums and who omits no safeguard provided by law to obviate conflict, it offers no alternative except final judgment in both courts, which judgments may be diametrically conflicting, and which, if conflicting, must involve him in unavoidable and inextricable conflict with both the state and federal judiciary.

Remedy by review of state court's judgment.

It must be the learned circuit judge was right, when he said: "Since, in a suit between the same parties, the contract has been interpreted and the rights of parties thereunder finally adjudicated, and that adjudication plead as a bar to the suit and satis-

factorily proved, this suit must be dismissed; and if parties desire to have their rights under the contract passed on by the federal court of last resort they must do so by appropriate proceedings for the review of the decision of the state court."

FRED L. HAY,
City Solicitor.

HENRY B. HARRIS, and
JOHN P. CAMERON,
Solicitors for the Council of the City of Defiance.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 257.

THE DEFIANCE WATER COMPANY, APPELLANT,

v.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE, APPELLEES.

APPELLEES' SUPPLEMENTAL BRIEF.

As our original brief was printed before we had opportunity to inspect appellant's brief, we submit this supplemental brief.

We suggest that the court examine the pleadings, both in the Federal and in the State courts, as there is room for difference of opinion as to the issues raised, especially as to what appellees "admit in substance," which phrase is so frequently used in the statement by appellant.

Bill, p. 1, Rec.; amendment, p. 25, Rec.; sup. bill., p. 33, Rec.; answer, p. 56, Rec.; reply, p. 80, Rec.; amend-

ment to prayer, p. 86, Rec.; plea, p. 89, Rec.; decree, p. 98, Rec.; assignments of error, p. 100 Rec.

Petition in State court, p. 148, Rec.; answer, p. 166, Rec.; reply, p. 175, Rec.; decree, p. 192, Rec.

First. The objection (p. 11, Appellant's Brief) that the plea of *res adjudicata* should have been named *supplemental answer* or *cross-bill* we think of little importance. The complainant, when the plea was presented as a supplemental answer, insisted vehemently that it should be called a plea and must be so presented and named, and the court considered this argument very persuasive and ordered that the name of the paper should be changed; but now the contention is made that the original name should have been retained. We find that such a pleading has been called by the various names "Cross-bill," "Supplemental answer," and "Plea," but the trial court preferred to follow the judgment of this court as announced by Mr. Justice Davis in Cajole *v.* Curtis, 80 U. S., 465, *473*, and the practice of the circuit court of the sixth circuit.

Second. The claim made by appellant in its brief (p. 12) that the same question had been passed on by the court, we think is erroneous. The defendants below asked the circuit court to stay proceedings until the case in the State court could be finally adjudicated, and this was overruled (Rec., p. 80 to 85). After new members came into the city council application was made to Judge Wanty that the appearance of such new members be entered, and he concluded that was unnecessary, and the opinion on that application is that referred to by Judge Wing at page 88 of the record. The

request to stay proceedings because of the former pendency of another suit is an entirely different question from the aplication for leave to plead a judgment in another suit between the same parties.

Third. (1) It is claimed the parties are not the same (p. 13). That in the suit by the city against the Council and the Water Company, the Water Company is merely a nominal party.

In suits in equity those persons are proper parties whose rights or interests are affected and those are necessary parties who are entitled to contest plaintiff's right to the relief sought, or without whose presence and opportunity to be heard full equity cannot be done.

Con. Water Co. *v.* San Diego, 35 C. C. A., 681, and cases.
McArthur *v.* Scott, 113 U. S., 340; B. 28, p. 1015.
Penn. *v.* Hayward *et al.*, 14 O. S., 302, 306.
Sec. 5006, Rev. St. Ohio.
N. Or. Water W. Co. *v.* N. O., 164 U. S., 471.
State Cal. *v.* So. Pac. Co., 157 U. S., 249.
See p. 5 *et seq.*, Appellee's Brief.
Gas Light Co. *v.* Zanesville, 47 O. S., 35, *49*.

(2) The claim that the *subject-matter* of the two suits is not the same is likewise without merit (p. 13). In the State courts the suit was by the city against the Water Company to declare there was nothing due or payable to the Water Company under the contract, because the contract was illegal and void and prohibited by law for the reasons stated. In the Federal court the suit was by the Water Company against the city to have the contract declared valid, the city enjoined

from disputing its validity and compelled to pay the amount claimed to be due under the contract. The fact that one party claimed there was nothing due, which the other party disputed, in one case, and in the other case the last party claimed a certain amount and the first party claimed there was nothing due, does not make a different question or a different issue. The question is, after all, whether the contract is valid and anything is payable under it, and that was the question decided in the State court, and that is the question sought to be decided in the Federal court. (See pp. 35 and 36 and pp. 4 to 12, Defendants' Brief.)

But appellant contends (p. 14) that the circuit court of the State had no jurisdiction of any claim by the Water Company. The city stated that there was an alleged or pretended contract running for thirty years on which the Water Company was claiming and the council threatening to pay upwards of three thousand dollars every six months, and that no payments could ever be legally made under the contract because it was void and prohibited for certain reasons stated. This the Water Company denied and set up certain grounds of estoppel, and under this the court, on the issues, had jurisdiction to determine the validity of the contract and whether anything was due or payable under it. If a suit should be brought to set aside a note for illegality or fraud in obtaining it and it was adjudged void and canceled, it could hardly be claimed that because the defendant did not by counterclaim ask judgment for the amount he claimed due him on the note he could afterward sue on the note and obtain judgment. That is substantially the position of appellant here. The statutes of Ohio authorize any court, common pleas or circuit, to grant leave to answer or amend upon ruling on a

demurrer (sec. 5113), and the statute provides that the answer may contain denials and affirmative matter, counter-claims, or set-offs, such as heretofore have been considered either legal or eqaitable defenses (sec. 5070); so that the contention that the circuit court had no jurisdiction except upon the pleadings made below is not well taken.

(3) The contention (p. 15) that the capacity in which the parties sue is different we believe is not well grounded. (See p. 37 *et seq.*, Defendants' Brief, especially middle of page 39.)

The claim that as the city solicitor's suit is for the taxpayers therefore it is not a suit by the city is not well founded. The question has been decided by this court in *Scotland County v. Hill*, 112 U. S., 183, *186*, and in Ohio in Zanesville Gas Case, 47 O. S., *49;* Ransom *v.* City Pierre, 41 C. C. A., 585, *588*, and cases.

The City of Defiance and the Water Company are adversary parties in both suits. That the third party, The City Council, was adversary to the city in one suit and codefendant with the city in the other is immaterial. In truth and in fact, by its allegations of fraud and conspiracy in bringing the suit, the Water Company made both the city and the City Council adversary parties to it.

Fourth. Counsel, with all their diligence, find one case that holds that a ruling on a demurrer prevents a re-examination in the same court of the law and facts of the case when pleadings are amended or answer filed (p. 17). The affirmance of that case by this court did not involve a determination of this question. (See p. 41 *et seq.* of defendants'

brief.) Counsel, it seems to us, confuse precedent and *res adjudicata*. The binding effect of former adjudications is waived if not pleaded. The persuasive influence of a precedent exactly in point abides, though not pleaded. The first is conclusive on all the courts within the United States. The second is conclusive only on inferior courts within the same jurisdiction. The distinction between precedent and *res adjudicata* is shown in Fuller *v.* Hamilton, 53 Fed. Rep., 411, and Billings *v.* Gilmore, 60 Fed., 332; 8 C. C. A., 645.

Fifth. It is said (p. 20) that the judgment of the State court is of no effect because proceedings IN ERROR for its reversal were pending in the supreme court of Ohio. (*a.*) No objection or assignment of error on this ground was made. (*b.*) It does not appear that it was disclosed to the court below that proceedings in error were pending (Sherman *v.* Dilley, 3 Nev., 21, 27). The only reference in the record to the supreme court of Ohio is found on page 204 at the conclusion of transcript of docket and journal entries of the circuit court, which, in the printed record, commence near the bottom of page 196, and is in these words:

"Filed May 25th, 1901, in supreme court of Ohio. J. B. Allen, clerk."

And the same file-mark on the transcript of Trial Docket Entries, p. 211.

The proceedings to obtain a reversal of a judgment by the supreme court of Ohio must be by petition in error filed in the supreme court, on which a summons must be issued by the clerk and served on the defendants to the error proceeding, or publication made as in the commencement of an

action; and a proceeding in error is, by statute and the decisions of the court, deemed commenced at the date of the summons in error which is served.

Sec. 5035, Rev. St. Ohio.
Sec. 4987, Rev. St. Ohio.
Robinson *v.* Orr, 16 O. S., 284.
Buckingham *v.* Commer. Bank, 21 O. S., 131.
Bowen *v.* Bowen, 36 O. S., 312.
Sidener *v.* Hawes, 37 O. S., 544.

So that there is no showing whatever in the record that a proceeding in error had been commenced at the time of the trial in the lower court.

In Ohio even enforcement of a judgment or decree can only be suspended by supersedeas bond. There is no showing bond was given.

(*a.*) It is contended (p. 20) that a proceeding in error suspends the effect of a judgment in Ohio so that it cannot be used as the basis of a plea of *res adjudicata.* The citations from text books do not sustain this contention. The California cases are based upon peculiar statutory provisions, particularly section 1049 of the California Code. By statutes of Missouri and Tennessee the appeal, when perfected, vacates the judgment, and the cases cited are under those particular statutes.

But these decisions are contrary to the almost universal rule in the State courts and the rule of the Federal courts. (See pp. 27 to 30, inclusive, Appellees' Brief.)

Sixth. It is contended (p. 21) that the suit in the State court was brought by collusion between the city solicitor

and the council, and therefore the judgment is not *res adjudicata*. The record shows that the petition of the city was filed January 4, 1898 (Rec., p. 148); that in its petition for removal of the cause to the circuit court of the United States on January 19, 1898, the Defiance Water Company made the charge that the city and its council conspired and colluded together to bring the suit (Rec., p. 153); that the same contention was made in the answer of the Defiance Water Company, filed in the State court on the 10th of February, 1900 (Rec., pp. 173, 174); that the defendant Water Company, on the trial in the State court, had an opportunity to sustain its contention, and tendered the evidence it had on that subject, which it has not deemed of sufficient importance to print for the use of this court, and the contention of fraud and conspiracy was by the State court decided adversely to the Water Company with the other affirmative issues tendered by it in its answer.

The claim is not made that there was any fraud or imposition practiced in inducing the State court to take jurisdiction, or that the defendant was by fraud prevented from making defense, or the like, which are the only grounds of fraud on which, in any court, the binding force and effect of a judgment can be questioned in a court of co-ordinate jurisdiction.

But neither in this court nor in the Ohio courts can such a charge be used to prevent the binding force of a judgment between parties. (See p. 39 *et seq.*, Appellee's Brief.)

II.

ERROR AT THE HEARING.

First. The claim (p. 21) that the record offered by defendants below should not have been received is not well taken, for the reasons assigned at page 15 *et seq.*, defendant's brief.

The cases cited at top of page 22 in support of this claim by appellant do not sustain the doctrine that a transcript of a record is not admissible unless it is a transcript of the complete record.

There was no error in rejecting the transcript of the record filed and proceedings of said case offered by complainants for the reasons set forth at page 25 *et seq.*, Appellee's Brief.

Second. The claim (p. 22) that the evidence offered by defendant would have proved the judgment a nullity is discussed at pages 21 to 26, inclusive. The transcript at page 22, Schmalt's deposition at page 25, adjournment of court, pages 25 and 26, Appellee's Brief.

But the facts do not, as appellant contends, show a judgment was not rendered during term, but, on the contrary, appellant has printed in the record at page 211 a certified copy of the trial docket of the State court showing the submission of this case March 14, 1901, and the judgment of the court March 15, including a minute of all the orders then made over the signature of the presiding judge of the court, who announced the opinion and judgment of the court orally on the 15th of March, before adjournment of court (Appellee's Brief, pp. 22 to 27).

III.

The contention (p. 25) is made that the court erred in refusing to hear the case upon the *general issues* as well as upon the issues on the plea and answer thereto.

It is claimed that the plea failed to meet nearly all the material issues of the bill.

Nowhere in the brief of appellant, in the assignments of error, or in the record does the appellant disclose either to this court or did it disclose to the court below what claims of the bill were not met (7th Assmt., p. 102, Rec.; Objection, Rec., p. 99; Brief, bottom p. 25).

Under this contention two propositions are submitted.

The first (page 26) is that the case in the State court did not cover the plea of estoppel, which appellant says was the principal theory of the bill.

The second proposition (page 34) is that the statutes of Ohio under which the suit was brought did not authorize a suit in the State courts against the appellant.

As to the first proposition, the Defiance Water Company, in its answer in the State court (Rec., p. 166), makes numerous denials.

For its second defense the Water Company, at the middle of page 166, commences the plea of estoppel and says that "the plaintiff ought not to maintain its suit against this defendant, because," etc.; and in that answer of estoppel, which covers seven and one-half pages of the printed record and concludes, at the bottom of page 173, with the allegations that "the said city is now estopped from denying the validity of the contract and from refusing to pay the consideration price named therein," and in said answer there is set up

every allegation and statement in letter or in substance the same as in the bill, amendments, and supplements thereto, except the statements of the particular amount of the bonds taken and held by Boody, McClellan & Company, Dennis, Long & Company, and N. C. Sprague, in the place whereof is the general statement that all the bonds were taken by the said parties in interest. An issue was tendered to these allegations by the reply, and was submitted to the State circuit court on the evidence, and judgment was rendered against the Water Company.

Appellant in its brief in this court (pp. 26 to 34) argues the question of the sufficiency of this defense. We take it that it is immaterial and not proper matter of argument here. It is not whether the bill, under its theory and charge of an estoppel, or the answer, under its theory and charge of estoppel against the city, presented a good cause of action or defense or what the law on the subject of estoppel as it relates to municipal corporations is; but was this question of estoppel decided by the State circuit court. Very persuasive that the same question was submitted to the State circuit court is the fact that the argument which is presented to this court is an exact transcript of the argument presented on the same behalf in the State court on the suit pending there.

In the State court the city avers the contract is illegal and prohibited for certain reasons which it sets forth, and prays that the payment of any amount under the contract during the period for which it purports to run may be enjoined. The Water Company answered, denying the allegations of the petition, setting up the facts which it claims constitute an estoppel as a second defense. As a third defense pleaded the pendency of the suit in the United States court, and that

the suit in the State court was brought by fraud and collusion between the city solicitor and the council. These affirmative matters were denied and a judgment rendered declaring the contract void and enjoining the payment of anything under it. In the Federal court the Water Company brought a suit to have the contract declared valid, charging that the city had by ordinance or resolution impaired its validity and averring that the city claimed the contract was illegal and void, but averring that, if it were in its inception illegal, it had been made by the council and the Water Company's assignors, and that by reason of the same facts set up in the State court the city was estopped to dispute its validity or to prove facts which showed it was invalid, and further asked the court to take an account of the amount due it and order that it be paid by the city.

The only difference is that in the State court the city asserted that there was nothing due, and the Water Company denied this and asserted that the city should be estopped from disputing that the whole amount appearing on the face of the contract to be payable thereon was or would thereafter become due, while in the Federal court the Water Company by its amendment avers that there will be $3,142.50 due at the end of each six months during the period the contract has to run, and asks the court to take an account of the amount due and order it paid. If the claim that there is nothing due on a certain contract, and a judgment is entered that there is nothing due, meets and disposes of the claim that there is 30,000 or more dollars due on the same contract, then the plea meets all the issues of the bill.

The issues in both cases are:

1st. Was there a valid contract between the parties?

2d. If there were not a valid contract in its inception was the city estopped by the acts of its officers or its own acts from disputing the validity of the contract; and

3d. If the contract was valid or dispute of its validity estopped is there anything due on the contract?

Under the principle that the greater includes the less, a judgment that there is nothing now or hereafter payable on the contract includes a decision that the large amount claimed is not payable on the contract.

After all, we believe the best test for determining whether these matters were litigated would be the effect of diverse judgments in the two cases. The city in the first suit is prevented from paying the Water Company. Suppose in the second suit the city were ordered to pay the Water Company, these judgments bring about a conflict of Federal and State authority. One of the beneficial objects of the doctrine of *res adjudicata* is that unseemly conflicts between courts of concurrent jurisdiction shall be avoided. Certainly, a good test is whether it brings about the desired result.

Second. The second contention (p. 34) of complainant is that the case should have been heard upon all the issues, because the statutes of Ohio did not authorize the suit in the State court against this appellant.

(*a.*) No objection was made in the Federal circuit court that the State court did not have jurisdiction of the subject-matter or the person of the Water Company (Rec., p. 98).

No such assignment of error is made in this court (Rec., p. 100).

(*b.*) The appellant pleaded the judgment of the State common pleas court, sustaining its demurrer and dismissing plaintiff's petition in that court, as an adjudication in its favor, by supplement to its bill, and is estopped in this case to dispute the jurisdiction of said State court (Rec., p. 33).

(*c.*) The statute is not subject to such narrow construction. In Cincinnati Street Railway Co. *v.* Smith, Judge Gilmore of the supreme court of Ohio, in announcing the opinion of the court, ofter quoting sections 1777 and 1778, says:

"The sections do not provide remedies that were previously unknown. Courts of equity had long taken jurisdiction and granted injunction in such cases when properly presented by interested individuals, whose rights were in jeopardy, by the illegal or unauthorized acts, or threatened acts, of municipal corporations. The sections were therefore simply intended to regulate the practice in such cases to this extent, that applications for injunctions in such cases should be made by the city solicitor, and should not be made without his knowledge."

Cin. St. Ry. Co. *v.* Smith, 29 O. S., 303.
Gas Light Co. *v.* Zanesville, 47 O. S., 35, *49*.

So that appellant's contention that the statute of Ohio authorizing this suit limits the parties against whom this may be brought to the city council is not the view of the supreme court of Ohio, but the ordinary rules of courts of equity govern the suit as they did before, and the sections referred to were "*simply intended to regulate the practice in such cases to this extent that applications for injunctions in such cases*

should be made by the city solicitor and should not be made without his knowledge." The same parties who would be proper or necessary parties to an ordinary bill in equity are proper and necessary parties to a suit of this nature, according to the rule of the supreme court of Ohio construing this statute. This question is discussed at page 2 above.

Neither is it true that this statute applies only to contracts not executed. No less than fourteen times has the supreme court of Ohio held that payments cannot be made by counties, townships, school districts, or municipalities under illegal contracts under statutes prohibiting such contracts, on suit brought by the attorney general, prosecuting attorney, city solicitor, or taxpayer.

Under this statute and like statutes city councils, county commissioners, school district and township trustees have been prohibited from paying for sewers, bridges, halls, fire department supplies, attorneys' fees, superintendent's services, and nearly every conceivable kind of material and services.

City Lancaster *v.* Miller, 58 O. S., 558, sewer contract.
City Findlay *v.* Pendleton, 62 O. S., 80, attorney fees.
State *v.* Hoffman, 25 O. S., 328, Sup. St. imp.
Doit *v.* Village Riverside, 4 C. C., 312, sup. con. hall.
Comstock *v.* Nelsonville, 61 O. S., 288.
Niles W. Co. *v.* Niles, 59 Mich., 311.
S. C., 26 N. W., 525.
Com'rs *et al. v.* State *ex rel.*, 66 O. S., 654.
Findlay *v.* Pendleton, 62 O. S., 80.
Buchanan Bridge Co. *v.* Campbell, 60 O. S., 406.
At. City W. W. *v.* Read, 15 Atl., 10.
City Wellston *v.* Morgan, 59 O. S., 148.
Cases cited pp. 46, 47, Appellee's Brief.

We do not understand that State *v.* Com'rs, 56 O. S., 718, is authority for the proposition quoted. It holds that the taxes levied for improving, grading, and macadamizing a certain road, which had been voluntarily paid, could be used for that purpose, although the taxes had been levied under an unconstitutional act, and that it would not be a misappropriation of the money paid on these taxes now in the treasury to the credit of this fund to use them for the purpose for which they were voluntarily paid. The funds there in issue had been voluntarily paid for the express purpose of grading and macadamizing a certain avenue; and the court held they could be used for that purpose. The taxes in question were levied under the general law of Ohio for furnishing the city with water, not for paying the Defiance Water Company's bills for water. This contention goes to the correctness of the adjudication of the State court, not to the question of the fact of former adjudication, which is the only issue here.

IV.

We cannot agree with complainant in its claim (p. 35) that the Water Company is entitled to a final decree without trial on the merits, even if the court should hold that the plea of *res adjudicata* is not well taken. There are numerous reasons why this is so. The city's answer denies that any ordinance or resolution impairing the contract between the Water Company and the City was ever passed, and if any were ever passed that it was ever published, and aver that under the law of Ohio it did not become a law or have any force and effect without such publication, and hence could be no

impairment. Besides this, substantially every material allegation of complainant's bill in the Federal circuit court on which its right of action depends is denied by the answer of the city, and the failure of the Water Company to perform its contract, if it had one, is set up at large, and hundreds of pages of testimony which are not before this court have been taken sustaining, as we think, every averment of the answer and disproving every claim of the bill. And on these issues and the proof the case should be heard if the adjudication pleaded is not final, and if the court, under the answer, has jurisdiction of the subject-matter. This, in conclusion, brings us to this suggestion, to wit:

The complainant, the Water Company, a citizen of Ohio, brings its suit against the City of Defiance and its council, all citizens of Ohio, in the Federal court, on a contract which it seeks to enjoin the city from disputing, and alleging, as ground of Federal jurisdiction, that two years before the bringing of the suit the city council of the city of Defiance had passed an ordinance or resolution denying that the Water Company had a valid contract and resolving that it would not pay anything thereafter on that contract, and further alleging that for two years thereafter, four times, the city did pay the semi-annual installments claimed to be due under that contract, but that by said resolution or ordinance the obligations of the contract between the City and the Water Company were impaired. By its answer the city disputes that any such ordinance or resolution was ever passed or that it or any ordinance or resolution of said council impaired or was intended to impair the obligations of the said contract; that in truth and in fact there was no contract,

and that the city and its officers disclaimed any reliance on or use of said so-called impairment ordinance or resolution or that it ever has relied or now relies on the same or any ordinance or resolution for any right, defense, or benefit in the contest and dispute between the said City and the Water Company further than that the alleged ordinance or resolution of January 7, 1896, was a resolution notifying said Water Company that it had failed and was failing to comply with the terms of the contract which it claimed to be existing between it and the City of Defiance. Further than this, the city averred that the said resolution, if one ever existed, had been repealed by the said council long prior to the commencement of the said action by the said Water Company.

We contend that when this answer came in disclaiming reliance on the said so-called impairment ordinance or resolution of January 7, 1896, or any other ordinance or resolution, either as the basis of a cause of action or ground of defense in any manner or form in said suit, and that said resolution, whatever it was, had been repealed, all ground of Federal jurisdiction, disappeared and that the court should forthwith have dismissed the action.

FRED L. HAY, *City Solicitor*,
HENRY B. HARRIS AND
JOHN P. CAMERON,
Solicitors for the Council of the City of Defiance.

(18,426)

Supreme Court of the United States

OCTOBER TERM, 1903

No. 21

THE DEFIANCE WATER COMPANY, Appellant,

vs.

THE CITY OF DEFIANCE, AND THE COUNCIL OF THE CITY OF DEFIANCE, Appellees.

Appellees' Reply to Appellants' Supplementary Brief.

The appellees submit that though the judgment of the State circuit court has been reversed by the supreme court of Ohio, no error appears in the record and proceedings of the U. S. circuit court in this case. Ordinarily a judgment can be reversed only where error appears on the record.

It cannot be justly said that the court below erred in giving force and effect to an existing judgment, and in not anticipating and giving effect to a judgment not in existence

when its decision was rendered. The United States circuit court passed on the judgment of the State circuit court, not on the subsequent judgment of reversal by the Ohio supreme court.

When this court has reversed a judgment on which the judgment under review is based, on several occasions, it has reversed the judgment under review or dismissed the appeal or writ of error pending here because of the former judgment of reversal which this court itself had rendered.

Chicago, etc. R. R. Co. v. Fosdick, 106 U. S., 82.
Butler v. Eaton, 141 U. S., 240.
Montana Mining Co. v. St. Louis M. & M. Co., 186 U. S., 24.

When matters affecting the jurisdiction of this court are not shown by the record, and are not within the personal knowledge of the court, under some circumstances, they may be shown by extrinsic evidence, upon proper proceedings being taken.

Dakota County v. Glidden, 113 U. S., 222, **226.**
Kimball v. Kimball, 174 U. S., 158.
Mills v. Green, 159 U. S., 651.

Ordinarily the proceedure is to remand the cause to the trial court with directions to allow the parties to make such showing of extrinsic facts, as they may be advised is necessary, and the court may deem appropriate.

Ballard v. Searls, 130 U. S., 50.
Estho v. Lear, 7 Peters, 130.
Ward v. Joslin, 44 C C A., 456, **463;** 105 Fed., 224, **231.**

In the event of such remand, the costs should abide the final result of the suit.

Wiggins Ferry Co. v. Ohio & Miss. Ry. Co., 142, U. S., 396, **412, 413, & 416.**
Washington Market Co. v. District of Columbia, 137 U. S., 62.
Mills v. Green, 159 U. S., 651.

Especially should this be so when, as in the case at bar, the successful parties have prosecuted their suit by ap-

propriate proceedings, the court has committed no error, and the adjudication under review is on a question anciallary and supplemental to the main issues, and those issues have not yet been determined.

We do not think the judgment, based on an adjudication which has been reversed, should conclude the rights of the appellant though the subsequent reversal is not ground for error before the appellate court.

If this court reaches the conclusion that the United States circuit court properly retained jurisdiction of the cause after the filing of defendants answer, and the judgment of the circuit court dismissing the bill should not be affirmed because the court was without jurisdiction, we are willing, and appellees agree, that this court, by consent of all parties, shall reverse the judgment of the U. S. circuit court as to the former adjudication, and remand this cause to the circuit court for trial on the issues joined by the bill, answer, and replication, and on such other issues as the circuit court may permit to be tendered; or, we agree that this court shall remand the cause to the United States circuit court to have the reversal of the judgment of the State circuit court shown by proper pleadings, and hearing had and adjudication made thereon, and on the other issues joined or hereafter joined in the cause; or, we agree, that such other orders and judgments be made regarding the question of adjudication by the State circuit court and the reversal thereof by the Ohio supreme court, and for the trial of the issues joined by the bill, answer, and replication, or by such other pleadings as the circuit court may permit to be filed, as, in the opinion of this court, may be appropriate in the premises and necessary to protect the rights of both parties.

Ballard v. Searls, 130 U. S., 50.

Farmers and Merchants State Bank v. Armstrong, 146 U. S., 499.

II

The jurisdiction of the United States circuit court was invoked by the appellant, complainant in the lower court, on the ground that on the 7th day of January, 1896, the Council of the City of Defiance, as complainant alleges, passed an *ordinance or resolution* impairing the obligations of the City's contract with complainant's assignor. The alleged impairing ordinance is as follows:

"A Resolution to Draw Warrant in Favor of Water Company for $3,160.00.

Whereas, The Defiance Water Company have submitted a bill to the city council for $3,160 alleged to be due them for said water rental for the past six months, and

Whereas, Said Council are of the opinion that no water contract exists or is between said city and said company for the payment of the same and furthermore that said bill is in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity; and

Whereas, The best interest of the city, in their opinion, demands that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to said City upon fair and equitable terms, therefore

Be it resolved that the City Clerk is hereby directed to forthwith draw his warrant on the City Treasurer against the water fund of said city for the sum of $3160 00 in favor of said Defiance Water Company in full payment of said bill, provided however, that if said warrant be accepted by said company it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgement of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to said company."

(Rec. p. 74, Ex. D.)

The allegations of the bill touching these jurisdictional facts are found at the bottom of page 7, et seq., of the record.

Complainant avers in its bill that after the date of this so-called impairment resolution four semi-annual installments of hydrant rental were paid to it by the city, under the contract. (Rec. p. 7.) Defendants, by their answer,

deny that such *ordinance or resolution* was ever passed, or that any claim was ever made by them that the resolution of January 7th, 1896, repealed, annulled, or impaired the contract ordinance, and deny that the city or council ever placed, or do now place any reliance on said resolution further than as a notice to said company that it was not complying with its contract. They aver that the said *ordinance or resolution* was simply a resolution and that, in Ohio, an ordinance cannot be repealed, annulled, or impaired by a resolution; that, if said resolution was ever passed, it had been repealed long prior to the commencement of complainant's suit. (Rec. pp. 65 to 69 inc.)

Our contention is that, on the coming in of this answer and on disclosure of the facts therein set forth, in connection with the facts in complainants bill, the complainants' suit should have been dismissed by the United States circuit court under the rules laid down by this court in—

Robinson vs. Anderson, 121 U. S., 522.

Shreveport vs. Cole, 129 U. S., 36, **44.**

St. Paul Light Co. vs. St. Paul, 181, U. S, 142.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 185 U. S., 282.

This contention is stated on pages 17 and 18 of our supplemental brief submitted on the hearing.

If we are right in this view, the case at bar simply presents a case in which the trial court entered the right judgment, but did not state all the reasons which might have been given therefor, and the judgment of the circuit court dismissing complainants' bill should be affirmed, without prejudice to complainants' right to bring suit, in any court of competent jurisdiction, to recover the amount claimed to be due from the city.

III.

But, if we are wrong in the contention that, on the rec-

ord, the lower court should have determined or that this court should now determine the jurisdictional question, the issues as to whether or not the alleged impairing *ordinance or resolution* was ever passed, or published, whether it was repealed, what its meaning and effect is, are vital and undetermined.

The complainant asks for an accounting and an order that the city pay to it the amount it claims to be due to it from the city under the contract. On the other hand, the city and the council claim that the company has not complied with its contract in any particular. This presents an issue which the defendants are entitled to have tried in this case in which the Water Company seeks to obtain an order for the payment of the money it claims under the contract.

Walla Walla vs. W. W. Water Co., 172, U. S., 1, 23.

The contract ordinance provides: "Sec. 14. Any neglect or refusal on the part of Samuel R. Bullock & Company, their associates, successors, or assigns, after due notice shall have been given them to comply with all the requirements of this ordinance, shall cause a forfeiture of the hydrant rental until each and all of the said requirements herein provided for are complied with." (Rec. p 18)

The city and its council set up in their answer that the Water Company did not comply with the contract in numerous respects, which are specified, and that, though the city notified the Water Company to comply with the said contract, it neglected and refused to do so in every material respect, and that it has not since complied with the contract in any respect, and under the express stipulations and covenants of this section of the contract no hydrant rental is due or payable to the complainant. (Rec. p. 70, et seq.)

These issues and others of equal weight and importance have not been heard or submitted, and on all of them the defendants are entitled to a full hearing. The suggestion that, by reason of their having objected to the complainants offering evidence on the issues joined by the bill, answer and

replication, they should not be allowed a hearing thereon, we apprehend is not placed on sound reasoning, or grounded on fact. The record discloses that, at the time of the trial, the circuit court, sua sponte, announced that the cause was for hearing on the issues presented by the plea of former adjudication, and all remarks touching a hearing on other issues were solely between the complainant and the court, and the record discloses that the defendants did not make objection to hearing the cause on all the issues or offer a single suggestion on the subject. This matter was solely between complainant and the court, (see Rec pp. 98 and 99.) Surely parties should not be deprived of a hearing on and adjudication of important issues because the trial court, on its own volition, directed the order in which issues should be tried.

Respectfully submitted,

HENRY B. HARRIS and
JOHN P. CAMERON,
Solicitors for City Council.
FRED L. HAY and
WILLIAM D. HILL, City Solicitor,
Solicitors for City.

Supreme Court of the United States.

No. 21.—October Term, 1903.

The Defiance Water Company, Appellant, vs. The City of Defiance and the Council of the City of Defiance. } Appeal from the Circuit Court of the United States for the Northern District of Ohio.

[November 30, 1903.]

On the fourth day of January, 1898, the city of Defiance, a municipal corporation of the State of Ohio, by its solicitor, filed a bill in equity against the Council of the city of Defiance and the Defiance Waterworks Company, in the Court of Common Pleas of Defiance County, Ohio, praying that future payments under an alleged contract of August 17, 1887, between the Council of the City and Bullock & Company, who had subsequently assigned it to the Water Company, for the furnishing of water to the city for the term of thirty years from the date of the contract, be enjoined because of the invalidity of said contract, on grounds set forth. A preliminary injunction was granted. The Defiance Water Company thereupon presented its petition and bond for the removal of the case to the Circuit Court of the United States for the Northern District of Ohio, the petition alleging: "That this is a suit of a civil nature in which there is a controversy arising under the Constitution of the United States, in this especially that by means of it, the said plaintiff seeks to abrogate the contract alleged in its suit and to deprive this defendant of its property, the amount alleged in said plaintiff's petition to be due this defendant, under said contract, without due process of law and without trial by jury; to which end and for which purpose, the said Council of the said city of Defiance have colluded and conspired with the said plaintiff and it is by their said Council's procurement that the said plaintiff has brought the said suit."

The case was removed, but on January 24, 1898, was remanded by the Circuit Court of the United States to the Court of Common Pleas. On the same day the Water Company filed its bill in the Circuit Court of the United States against the city of Defiance, and complained that complainant was a corporation organized under the laws of the State of Ohio for the purpose of operating waterworks in the city of Defiance and thereby furnishing water to the city and to its citizens; that on January 4 the city brought the suit hereinbefore mentioned, and had obtained a preliminary

injunction therein; that on August 17, 1887, the city of Defiance duly passed an ordinance entitled "An ordinance to authorize and provide for the construction and maintenance of a system of waterworks in the city of Defiance, Defiance County, Ohio," a copy of which ordinance was annexed. The provisions of the ordinance were then set forth to the effect that by its terms the right and privilege for the period of thirty years thereafter was granted to Bullock & Company, their associates, successors and assigns, to locate and operate a system of waterworks in that city, and to use the streets of the city for the purposes thereof; that the city contracted to rent of Bullock & Company a certain number of hydrants and to pay a certain rental therefor; that the city, at the expiration of ten years, was given the right to purchase the system, or, if that was not then done, then at the expiration of five years thereafter.

It was averred that the ordinance was accepted by Bullock & Company, and the works were constructed, in the course of which Bullock & Company became indebted, and certain mortgage bonds were issued, which were outstanding and held by certain persons named; that Bullock & Company assigned all their rights and interests to the Defiance Water Company, and the Water Company completed the construction of the works to the entire satisfaction of the city, and the same were accepted March 5, 1889, by resolution.

The bill further averred that the city had used the hydrants and was still using them, and that it had paid all of the rentals claimed under the contract down to January 1, 1898, except the sum of $500 due in 1895, to recover which suit had been commenced. It was then alleged that the City Council "at its regular meeting, January 7th, 1896, passed an ordinance or resolution in substance rescinding and annulling said contract of the city with the Defiance Water Company, your orator, so far as it had power so to do; and providing by the terms of said ordinance or resolution, by which it should allow the bill of said Water Company for the rents that had accrued to them from the said city for the last half of the year 1895, that the payment of the said bill should not be 'construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals or in any manner implying any actual performance of any alleged contract and that no further payment at the present rate be made to the said company.'"

The bill then stated that there was due to the Water Company for the last half of the year 1897 the sum of $3,142.50 less $756, which, it was subsequently said, had been paid. And it was charged, on information and belief, that the Council and the several members of it had, ever since the passage of the resolution or ordinance of January 7, A. D. 1896, claimed and repeatedly stated and given out to the public generally, that the city had no such contract as aforesaid for furnishing water to it by the

Water Company; and that they had also passed resolutions and ordinances looking toward the construction of waterworks by the city, but nevertheless the city had given no notice of its intention to purchase and had not offered to purchase complainant's waterworks. And furthermore, that many, if not all, of the members of the Council combined, colluded and confederated together, and with the city solicitor, to procure him to institute the suit before mentioned, and to procure an order of injunction against themselves, the City Council, prohibiting them from paying complainant the amounts due and owing. The bill then averred "that if said order of injunction shall stand and be made perpetual, the said City and Council of Defiance, said defendants, will thereby deprive your orator of its property without due process of law, and by means of said order of injunction they will confiscate your orator's property and convert it to their own use without payment therefor and without trial by jury, contrary to the provisions of the Constitution of the United States." And it was further averred "that the passage of said ordinance or resolution and the attempt thereby to abrogate and annul said contract, contravenes the provisions of section 10 of article I of the Constitution of the United States, in this, that they are laws impairing the obligation of their said contract with your orator."

The prayer was that an account might be taken of the amount due complainant from the city of Defiance for water rents that may have accrued to it, and that the City and the City Council be decreed and ordered to allow and pay the same; that a provisional or preliminary injunction be issued to restrain defendants from appropriating and diverting the moneys in the water fund to the payment of any other indebtedness than that due complainant; and that on final hearing the Council and the City be perpetually enjoined from thereafter denying the existence of the contract, and abrogating or attempting to abrogate or annul the same; and for general relief.

The bill was subsequently amended and a supplemental bill filed.

To the bill as amended defendants demurred for want of jurisdiction, among other grounds specially assigned, and the demurrers were overruled. Complainant then filed a supplemental bill, and to the amended and supplemental bills defendants filed a joint plea, with an answer in support thereof, insisting, among other things, that the Court of Common Pleas of Defiance County had jurisdiction in the premises and that the Circuit Court had not. The plea was overruled and defendants answered, May 1, 1899, reserving their rights under their demurrers and plea; asserting the illegality of the alleged contract; insisting that complainant's bill was an attempt to secure a removal of the case from the State court to the Circuit Court, which had already been determined against complainant; denying the passage of any resolution or ordinance by the City Council impairing or

intended to impair the obligation of any contract with complainant or its assignors; and the performance of any act or the intention to perform any act toward the erection or construction of waterworks by the city; and submitting that the Circuit Court had no jurisdiction of the subject matter and that it ought to refuse to further hear or consider the cause.

Defendants attached to their answer, as they did to their plea, a copy of the resolution of January 7, 1896, referred to in the bill, and also copies of sundry other ordinances or resolutions, and denied that *that of* January 7, 1896, or any other, had the effect, or was intended to have the effect, of impairing the obligation of the alleged contract with complainant; and insisted that if that, or any other resolution or ordinance, had the scope attributed to it, it was not lawfully passed under the statutes of Ohio; and further, that such resolution or ordinance had been repealed by various subsequent resolutions or ordinances for the payment of rentals to complainant, copies of which were attached. Defendants disclaimed any reliance on or benefit from any or all said resolutions and ordinances as releasing or intending to release the city from the obligation of the alleged contract, or that they served any other purpose than as notice that defendants claimed the ordinance of 1887 was void and illegal from the beginning. Defendants denied combination or collusion in the institution of the suit in the State court, and averred that the city solicitor acted on his own volition.

Replication was filed, and evidence taken, and on June 17, 1901, defendants, by leave of court, filed a plea setting up the final decree of the Circuit Court of Defiance County, entered March 15, 1901, in the suit commenced in the Court of Common Pleas, adjudging the alleged contract to be null and void, and perpetually enjoining the city of Defiance and the Defiance Water Company from carrying it out. Replication was filed to this plea, and a transcript of the record in the State courts was put in evidence. This showed that after the case commenced in the Court of Common Pleas was remanded to that court, a demurrer was filed to the petition, was sustained, and the petition dismissed, whereupon the case was carried to the Circuit Court of Defiance County by appeal. In that court the demurrer was overruled, the Water Company answered, the city replied, the case was heard on pleadings and evidence, and a final decree was rendered in favor of the City and against the Water Company and the City Council to the effect above stated. The Circuit Court of the United States on hearing sustained defendants' plea and dismissed the bill. From that decree complainant prosecuted this appeal, which was argued in this court, April 22, 1903. Thereafter, and on October 13, counsel for all the parties called the attention of the court to the fact that the case in the Circuit Court of Defiance County had been carried to the Supreme Court of Ohio by the Water Company, and that that court on June 16, 1903, had

reversed the decree of said Circuit Court, sustained the demurrer to the petition, and directed it to be dismissed. 28 Ohio Law Bulletin, 687. The Supreme Court held that, even if the alleged contract between the City and Bullock & Company were invalid, the cause of action to restrain its performance was barred by statute.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The decree of the Circuit Court was based on the decree of the State Circuit Court, which has been reversed by the State Supreme Court, and various suggestions have been made by counsel in respect of the judgment which they think should be rendered here in view of the termination of the litigation in the State courts.

But the question of the jurisdiction of the Circuit Court meets us on the threshold, and the disposal of that question disposes of this appeal.

Diverse citizenship did not exist, and, unless the case was one arising under the Constitution or laws of the United States, the jurisdiction of the Circuit Court was not properly invoked, and should not have been maintained.

We have repeatedly held that "when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *Shreveport* v. *Cole*, 129 U. S. 36; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424.

In the case last cited we said:

"The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a State statute to the impairment clause of the Constitution is to be passed upon by the State courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require, *Chicago & Alton Railroad Co.* v. *Wiggins Ferry Co.*, 108 U. S. 18; and if there be ground for complaint of their decision, the

remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the twenty-fifty section of the judiciary act of 1789, and has adhered to it in subsequent legislation."

Complainant rested its assertion of jurisdiction on two grounds:

1. That the resolution or ordinance of Jannary 7, 1896, impaired the obligation of the contract created by the ordinance of August 17, 1887.

2. That if complainant were perpetually enjoined, as prayed in the suit in the State courts, the State would thereby have deprived it of its property without due process of law.

1. The bill did not set forth the resolution or ordinance of January 7, 1896, *in extenso*, but stated that by its passage the City Council "in substance" rescinded and annulled the contract "so far as it had power so to do," in that in allowing a bill of the Water Company for accrued rentals it provided that the payment should not be "construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals," . . .

The record shows the resolution, which was as follows:

"JAN'Y 7TH, 1896.

"A resolution to draw warrant in favor of water company for $3,160.00.

"Whereas, the Defiance Water Company have submitted a bill to the city council for $3,160, alleged to be due them from said city for water rental for the past six months; and

"Whereas, said council are of the opinion that no valid contract exists, or is between said city and said company for the payment of the same; and furthermore, that said bill is, in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity; and

"Whereas, the best interests of the city, in their opinion, demand that the present service be discontinued and immediate steps be taken for the purpose of supplying water to said city upon fair and equitable terms: therefore;

"*Be it resolved*, That the city clerk is hereby directed to forthwith draw his warrant on the city treasurer against the water fund of said city for the said sum of $3,160.00, in favor of said Defiance Water Company, in full payment of said bill; provided, however, that if said warrant be accepted by said company, it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgment of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to said company.

"Passed Jan. 7th, 1896."

Clearly this resolution was not a law impairing the obligation of the contract. It was merely the allowance of a claim for rentals with a saving clause to prevent estoppel; and the semi-annual payments for 1896, and the first for 1897, were directed by subsequent ordinances to be made without any reservation.

And the City not only denies that the resolution (or any other) had or was intended to have the effect now attributed to it, but says that if this had been otherwise the resolution would have been invalid because not passed in accordance with the statutes of Ohio in that behalf.

The position of the City as disclosed by the record was, indeed, that no valid contract existed, and it was to test that question that the suit was instituted by the City Solicitor in the Court of Common Pleas, but there was no definitive legislative action taken by the City for the erection of its own waterworks, or otherwise, which was obnoxious to the prohibition of the Federal Constitution.

2. Nor does the contention that if the temporary injunction granted by the Court of Common Pleas should ultimately be made perpetual justify the assumption of jurisdiction because of violation of the Fourteenth Amendment.

Litigation in the State courts cannot be dragged into the Federal courts at such a stage, and in such a way. The proposition is wholly untenable that, before the State courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the State courts might so decide as to render their final action unconstitutional.

Moreover the State courts are perfectly competent to decide Federal questions arising before them and it is their duty to do so. *Robb* v. *Connolly*, 111 U. S. 624, 637; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 583.

And, we repeat, the presumption is in all cases that the State courts will do what the Constitution and laws of the United States require. *Chicago & Alton Railroad* v. *Wiggins Ferry Company*, 108 U. S. 18; *Shreveport* v. *Cole*, 129 U. S. 36; *Neal* v. *Delaware*, 103 U. S. 370, 389; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424.

If error supervenes the remedy is found in section 709 of the Revised Statutes.

The present case strikingly illustrates the applicability of these well-settled principles. The preliminary injunction was dissolved by the court by which it was granted, and the City's suit was dismissed by the highest judicial tribunal of the State.

We regard this bill as an attempt to evade the discrimination between suits between citizens of the same State and suits between citizens of different States, established by the Constitution and laws of the United States, by bringing into the Circuit Court controversies between citizens of the same State, an evasion which it has been the constant effort of Congress and of this court to prevent, *Bernards Township* v. *Stebbins*, 109

U. S. 341, 353; *Shreveport* v. *Cole*, 129 U. S. 36, 44; and are of opinion that it should have been dismissed for want of jurisdiction.

The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not. *Mansfield, Coldwater &c. Railway* v. *Swan*, 111 U. S. 379, 382; *Metcalf* v. *Watertown*, 128 U. S. 586; *Morris* v. *Gilmer*, 129 U. S. 315; *Continental National Bank* v. *Buford, ante*, ——.

The Circuit Court having maintained jurisdiction on the ground that the case arose under the Constitution ~~and laws~~ of the United States, and having proceeded to decree, the appeal was properly brought directly to this court, and it at once became our duty to inquire whether the Circuit Court should have retained the case. Having reached the result that the court erred in so doing, we are vested with the power to direct that conclusion to be carried into effect, and in its exercise we discharge one of our essential functions, the determination of the jurisdiction of the courts below. *Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115; *Aztec Mining Company* v. *Ripley*, 151 U. S. 79.

The bill was dismissed ~~below~~ but not for want of jurisdiction, and the decree will be reversed in order that the case may be disposed of on that ground, at the costs of appellant, which takes nothing by its appeal.

The decree is reversed at appellant's costs, and the cause remanded with instructions to dismiss the bill for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.